Mitra

on

THE LAW OF CARRIAGE BY SEA

Tagore Law Lectures

by

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PREFACE

In November 1968 I was invited by the Calcutta University to deliver lectures as Tagore Law Professor on a subject of my choice at a time convenient to me. I agreed to deliver the opening lecture on September 9, 1969—a date important to me as it happened to be the birth centenary of my father, the late Mr. S. C. Mitra, who was the first Indian Registrar to be appointed on the Original Side of the Calcutta High Court long before Independence and is still remembered as one of the few notable Registrars, either Indian or British, who have been appointed in the annals of that Court. Starting on the date abovementioned I concluded my lectures on September 27, 1969. As regards the choice of subject, I had long felt during my 46 years' career at the Bar that the interrelated laws of shipping, bankers' letters of credit and marine insurance were some of those branches of commercial law which deserved the particular attention of the Indian Universities, and I felt all the more so recently because of the steadily increasing volume of the international trade of India in post-Independence days and the certainty of further phenomenal increase thereof in the years to come. I sincerely believe that if among the Indian Universities the Calcutta University takes the lead in the matter and includes the subject of these lectures, *viz.*, the law of "Carriage by Sea", in its curriculum, in any event, as a special subject for its law-students, an earnest and systematic study of this branch of law is sure to yield fruitful results. The law of shipping covers such a vast field that the well-known British publication known as "British Shipping Laws" will take no less than fourteen volumes to cover it, and these lectures are devoted to the consideration of a part only of the whole law of shipping. The world is moving very fast, and we in India must not lag behind.

In the preparation of these lectures I have drawn upon, and I hereby acknowledge my indebtedness to, such standard works as "Halsbury's Laws of England," "Scrutton on Charterparties and Bills of Lading", "Payne on Carriage by Sea", "British Shipping Laws", and "Gilmore & Black on The Law of Admiralty" as well as Dr. R. K. Mookerji's excellent monograph on "Indian Shipping" (a copy of which was kindly lent to me by Dr. P. K. Bose, Pro Vice Chancellor, Calcutta University, at my request). I acknowledge thankfully the assistance which I received from *Lloyd's Calendar* (1967), the Annual Report of the Baltic & International Maritime Conference for 1968-69, and the printed booklet of symposium papers on the "Future of the Port of Calcutta" published in May 1969 by the Institute of Port Management, Calcutta. In these lectures I have also utilised some of the materials used in my books on shipping etc. which are pioneer works published east of Suez.

By the courtesy of Mr. H. Steuch, the then General Manager of the Baltic & International Maritime Conference, specimen forms of some of the charterparties and bills of lading of his Conference in common use have been reproduced in the Appendix to these lectures. Likewise,

the Chamber of Shipping of the United Kingdom and the Great Eastern Shipping Co. Ltd. of Bombay have very kindly authorised the reproduction in the Appendix of some of their specimen forms. It is needless to say that some of the contents of these lectures will be better and more fully understood if studied along with the speciman forms thus included in the Appendix. Considering the far-reaching importance of the topics usually dealt with in "TAGORE LAW LECTURES", it is eminently desirable that our younger generation should take them up in right earnest.

The publication of these lectures by the Calcutta University having been held up due to congestion in the University press, I was recently authorised by the University to publish them on my own.

All relevant and important decisions, English as well as Indian, published prior to the delivery of these lectures were referred to in them. However, decisions published since could not be included in these lectures, the most notable among them being the decisions in *Tradax S.A.* v. *Volkswagenwerk A.G.*, [1969] 2 Q.B. 599, and *The Annefield*, [1971] 2 W.L.R. 320 (applicability of "Centrocon" arbitration clause); *The Eleftheria*, [1969] 2 W.L.R. 1073 (Court's discretion to grant stay of proceedings against foreign carrier); *The White Rose*, [1969] 1 W.L.R. 1098 (Baltime form—owner's indemnity); *The Loucas N.*, [1970] 2 Lloyd's Rep. 482, (1971) 1 Lloyd's Rep. 215 (Gencon charter incorporating "Centrocon" strike clause—whether "time lost" provision independent of "laytime" provisions); *The Mihalis Angelos*, [1970] 3 W.L.R. 601 (cancelling clause in charterparty—assessment of damages); *Empresa Cubana de Fletes* v. *Lagonisi Shipping Co. Ltd.*, [1971] 2 W.L.R. 221 (Time charter—right of withdrawal); *Australian Coastal Shipping Commission* v. *Green*, [1971] 2 W.L.R. 243 (General average—expenses recoverable); *The Onisilos*, [1971] 2 W.L.R. 314, 1392 (Gencon general strike clause—demurrage); *The Delian Spirit*, [1971] 1 Lloyd's Rep. 64 (charterer's liability for delay—"arrived ship"); *Fison Fertilizers Ltd.* v. *T. Watson (Shipping) Ltd.*, [1971] 1 Lloyd's Rep. 141 (when vessel "unseaworthy"); *The Theraios*, [1971] 1 Lloyd's Rep. 209 (calculation of lay-days); *Kum* v. *Wah Tat Bank Ltd.*, [1971] 1 Lloyd's Rep. 439 (mate's receipts whether documents of title); *The Sinoe*, [1971] 1 Lloyd's Rep. 514 (whether charterers excused from liability for demurrage due to stevedore's incompetence); and *The London Explorer*, [1971] 2 W.L.R. 1360 (Time or voyage charter—delay in redelivery owing to strikes—liability of charterers).

My thanks are due to the ladies of my family for sparing me by their unremitting assistance the tedium of correcting proofs and preparing the index and the table of cases and checking up references.

My thanks are due also to my publishers for their promptitude and care in seeing the book through the press.

Calcutta
February 6, 1972

B. C. MITTRA

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LECTURE I

ORIGIN AND HISTORY OF MARITIME LAW

The law relating to shipping covers a very wide range. Hence for convenience of treatment it has been divided by the well-known publication known as "BRITISH SHIPPING LAWS" into eight principal sections, *viz.*

(*1*) ADMIRALTY PRACTICE,
(*2*) CARRIAGE BY SEA,
(*3*) COLLISIONS AT SEA,
(*4*) GENERAL AVERAGE,
(*5*) WRECK AND SALVAGE,
(*6*) INTERNATIONAL CONVENTIONS OF MERCHANT SHIPPING,
(*7*) MARINE INSURANCE, AND
(*8*) MERCHANT SHIPPING ACTS.

These lectures will relate to the topic of "CARRIAGE BY SEA" in so far as it concerns the carriage of goods, since the carriage of passengers by sea is of far less importance to the shipping industry. Other topics, however, will be referred to, as and when necessary.

GROWTH OF MARITIME LAW IN THE WEST

At the outset it will be useful to remember that the superior ease and safety of carriage by sea made it in pre-historic times and in olden days the principal means of the carriage of goods and people over great distances. From the earliest times, as far as Europe is concerned, customs took shape to channel maritime conduct to avoid trouble, but nothing like a formal sea-code has survived from Greek or Roman antiquity, though shipping law, as it exists to-day, began in the Mediterranean basin.

There is a strong tradition that a maritime code was promulgated by the Island of Rhodes, in the Eastern Mediterranean, at the height of its power ; the ridiculously early date of 900 B.C. has even been assigned to this supposititious code. But even the existence of such a code has been pretty well cast in doubt. Rhodes was at one time known in the Mediterranean basin as the "mistress of the sea", and the Rhodians' naval power and discipline were remembered even in the days of Cicero. But it will perhaps be not correct to presume that the Rhodians were the first to express the principle of general average in words, although the Digest of Justinian invokes the Rhodian law as authority. For it must have been already very ancient and very widespread as a practice before it became so neatly formulated. It must be remembered that in olden times, for perhaps thousands of years, the merchants or owners of cargo

used, almost as of course, to sail with their wares from port to port like pedlars. In these little vessels, mostly navigating the Mediterranean or Aegean Sea, where storms quickly spring up and subside, occasions would be frequent where shipwreck could only be averted by lightening the ship of portions of her cargo, a measure which, however beneficial to the rest, might to one man on board mean ruin. His consent to such a sacrifice could only be bought by a promise—first express, then customary and taken for granted—that when, or if, the ship came safe to shore, all who had profited by his loss would pay their share to make it good(1).

After the fall of the Roman Empire, its laws, in the deep barbarism that ensued in Europe, fell into almost absolute oblivion. They were no longer operative as laws and even the language in which they were written became more and more strange in Europe(1). The elaborate provisions of the Digest disappeared, and of the collections of customs recognised by seafaring men that which had the most extended authority was known as the Rolls or Judgments of Oleron. These were a collection of judgments probably delivered in some court of Bordeaux with reference to the commerce in wine which had its centre in that city. Richard I on his return from the Holy Land revised these judgments during his stay in the small Isle of Oleron off the west coast of France. For some reason or other these judgments held for a few centuries a very considerable authority over the greater part of Europe, and they have always been regarded as having a special importance for the maritime law of England.

Sea commerce in Europe never totally died out after the liquidation of the Roman power, but it became during the Dark Ages not so much a regular occupation as an extra-hazardous gamble of life and property. It remained marginal until the rise of the great Italian trading city-states, in full swing by around 1000 A.D. From this time until the era of the global Voyages of Discovery, shipping in the Mediterranean—stimulated perhaps principally by the Crusades—never flagged for long; by 1400, Venice, probably the greatest of the maritime powers of the day, is said to have had 3000 ships afloat, with well-protected lanes established to Syria and elsewhere. This period gave rise to what came to be called the law merchant(2).

Special courts or tribunals sat in Mediterranean port towns to judge disputes arising among seafaring people, and the natural desire of judges and disputants for settled guidance led to the recording of judgments in individual cases and to the codification of the customary rules by which mariners and their courts considered themselves bound(2). Two Mediterranean sea-codes, viz. those of Barcelona and Amalfi (near Naples) enjoyed in their days prestige and authority far beyond the ports where they were promulgated(2).

(1) *British Shipping Laws*, Vol. VII, Ch. I.
(2) Gilmore & Black on *"The Law of Admiralty"*, ed. 1957, Ch. I.

Following upon the westward and northward voyages of Phoenician merchants there was much maritime activity in the Atlantic ports of Europe and also in British, Scandinavian and Baltic ports, resulting in the establishment of maritime courts in those ports.

As maritime commerce grew in importance, its law attracted the attention of those Continental legal scholars and commentators who were reworking and adapting to their times the Roman or "civil" law. Treatises and commentaries appearing during the Renaissance and after acquired status as classic systematizations of the subject. Maritime law thus grew up and came of age under the tutelage of the civil law, and it still bears the imprint thus acquired even when administered in the courts of common law countries. As the great national states arose in Europe, the international law of the sea came to be assimilated into national law, or at least to be restated in authoritative codifications(2).

England participated fully in the medieval development of maritime law. Maritime courts sat in the English port towns, and adjudicated the causes before them by customary sea law. But the later English evolution had a special character. To the office of the Lord High Admiral (originally a naval official concerned with the command of the fleet and the suppression of piracy and wrecking) there was annexed a court which acquired a jurisdiction over civil cases of a maritime nature. By the time of Richard II the admiral and vice-admiral were transacting enough judicial business to move Parliament to limit their jurisdiction by statute to *"a thing done upon the sea"*, and in Tudor times the court was well established as a court of record, doing a large civil business. It slowly but surely took away most of their business from the local maritime courts in the port towns, and attracted the easily aroused jealousy of the common law courts, as well as the dislike of those who feared it as a prerogative court and as one that conducted its trials without a jury. The common law judges, relying on controversial constructions of the statutes of Richard II mentioned above, began issuing writs of prohibition against proceedings in admiralty except within absurdly narrow limits. In a nutshell, the construction of the words of the statutes that limited the Admiral's court to things *"done upon the sea"* was extremely literal, so that, *e.g.*, contracts having a maritime subject-matter but made on land (as most were) were held outside the jurisdiction of the Admiralty. By the end of the seventeenth century, the court was of comparatively little importance(2).

However, in the nineteenth century the jurisdiction of the court over maritime matters was vastly enlarged by statute, particularly by the English Admiralty Court Acts of 1840 and 1861. Now, the High Court of Justice and the Court of Appeal in London together constitute the Supreme Court of Judicature, and Admiralty practice in the Supreme Court of Judicature is governed principally by:

(*1*) the Supreme Court of Judicature (Consolidation) Act, 1925, and the Administration of Justice Act, 1956;

(2) those sections of the Admiralty Court Acts of 1840 and 1861 which were not repealed by the Act of 1925 nor by Rules of the Supreme Court having the repealing effect given by section 99 of the latter Act;

(3) the Rules of the Supreme Court, principally Order 75;

(4) case law;

(5) the Admiralty Short Cause Rules; and

(6) Practice Notes posted in the Admiralty registry.

The Colonial Courts of Admiralty Act, 1890, was passed by the British Parliament to amend the law regarding the exercise of Admiralty jurisdiction in British Dominions and elsewhere outside the United Kingdom. On the basis of the said Act of 1890 the High Court in Calcutta, having regard to its jurisdiction inherited from the Supreme Court, became the Colonial Court of Admiralty. By the provisions contained in S. 2, Colonial Courts of Admiralty (India) Act, 1891, the High Courts of Calcutta, Bombay and Madras, and the then District Court of Karachi were expressly declared to be Colonial Courts of Admiralty.

INDIA STOOD OUT AS THE HEART OF THE OLD WORLD AND MISTRESS OF THE EASTERN SEAS

We shall now turn to India to consider her history as a maritime country, and for this refer to Dr. Radha Kumud Mookerji's very illuminative treatment of the matter. According to him, for full thirty centuries India stood out as the very heart of the Old World, and maintained her position as one of the foremost maritime countries. She had colonies in Pegu, in Cambodia, in Java, in Sumatra, in Borneo, and even in the countries of the farther East as far as Japan. She had trading settlements in Southern China, in the Malayan Peninsula, in Arabia, and in all the chief cities of Persia and all over the east coast of Africa. She cultivated trade relations not only with the countries of Asia, but also with the whole of the then known world, including the countries under the dominion of the Roman Empire, and both the East and the West became the theatre of Indian commercial activity and gave scope to her naval energy and throbbing international life(2a). In fact, India has had extensive trade relations successively with the Phoenicians, Jews, Assyrians, Greeks, Egyptians, and Romans in ancient times, and Turks, Venetians, Portuguese, Dutch, and English in modern times.

The early growth of her shipping and shipbuilding, coupled with the genius and energy of her merchants, the skill and daring of her seamen, the enterprise of her colonists, and the zeal of her missionaries, secured to India the command of the sea for ages, and helped her to attain and long maintain her proud position as the mistress of the Eastern seas.

(2a) Mookerji's *"History of Indian Shipping"*, 1957 ed., p. 3. In the words of Sir Brajendranath Seal to be noticed in the Introductory Note to the first edition of this monograph on Indian shipping and maritime activity, it "gives a connected and comprehensive survey of a most fascinating topic of Indian history".

There was no lack of energy on the part of Indians of old in utilizing to the full the opportunities presented by nature for the development of Indian maritime activity—the fine geographical position of India in the heart of the Orient, with Africa on the west and the Eastern Archipelago and Australia on the east, her connection with the vast mainland of Asia on the north, her possession of a sea-board that extends over more than four thousand miles, and finally the network of rivers which opens up the interior. In fact, in India there is to be found the conjunction or assemblage of most of those specific geographical conditions on which depends the commercial development of a country(3).

EVIDENCE OF NAVIGATION OF THE INDIAN OCEAN BY INDIANS IN ANCIENT TIMES

The oldest evidence on record of the early existence of a complete navigation of the Indian Ocean and of the trading voyages of Indians to countries on the west is to be found in several passages in the Rigveda, "one of the oldest literary records of humanity". One of such passages—an invocation to Agni—when translated into English is to the following effect:—

> *"Do thou whose countenance is turned to all sides send off our adversaries as if in a ship to the opposite shore; do thou convey us in a ship across the sea for our welfare"*(4).

ADMINISTRATION OF MARITIME LAW

In fact Sanskrit literature in all its forms—such as the Vedas, the Sutras, the Puranas, epic and dramatic poetry, romance, etc. is replete with references to the maritime trade of India, which prove that the ocean was freely used by the Indians in ancient times as the great highway of international commerce(5). It is interesting to note that even in the ancient Code of Manu will be found such rules as relate to marine insurance or bottomry. It is still more interesting to note that the development of ship-building in India as a flourishing industry made it necessary to create during the reign of Chandragupta I a Board of Admiralty or Naval Department which is mentioned in the "*Arthasastra*" of Kautilya and was extremely well organized, dealing with all matters relating to the navigation of the seas as well as inland navigation(6).

Incidentally it may be mentioned that during the reign of Akbar there were framed elaborate regulations for the organisation of his Admiralty or Naval Department—regulations which were remarkably akin to, and in some respects may be thought to have been anticipated by, the regulations governing the Admiralty or Naval Department of Chandragupta I about 1900 years earlier(7).

(3) *Ibid*, p. 4.
(4) *Ibid*, p. 38.
(5) *Ibid*, p. 48.
(6) *Ibid*, p. 73.
(7) *Ibid*, p. 147.

WIDENING OF EASTERN NAVAL ACTIVITY

Besides the Roman trade, and the trade with the West generally, there was also developed along with it a trade with the East. The West alone could not absorb the entire maritime activity of India, which found another vent in a regular traffic in the Eastern waters between Bengal and Ceylon, Kalinga and Suvarnabhumi, and a complete navigation, in fact, of the Bay of Bengal and the Indian Ocean. This eastern maritime enterprise reached its climax in the age of the Gupta emperors, when India once more, as in the days of Chandragupta and Asoka, asserted herself as a dominant factor in Asian politics, and even showed symptoms of a colonizing activity that culminated in the civilization of Java, Sumatra and Cambodia, and laid the foundation of a greater India. Towards the later days of the Gupta Empire, Indian maritime activity in the Eastern waters had a vastly extended field, embracing within its sphere not only Farther India and the islands of the Indian Archipelago, but also China, with which a regular and ceaseless traffic by way of the sea was established and long continued. Lastly, we find the sphere of this Eastern naval activity widening still further during the days of Harshavardhana and Pulakesi, the Chalukyas and the Cholas, till Japan in the farthest East is brought within the range of Indian influence, and becomes the objective of Indian missionary and colonizing activity(8).

But, as remarked by Major Keith in an article in the Asiatic Quarterly Review (July 1910), "the old prosperity of India was based on the sound principle which is, that after clothing and feeding your own people, then of your surplus abundance give to the stranger"(9). And the chief items of Indian export were the "renowned art industrial fabrics", and "exports were not multiplied on the reprehensible practice of depleting a country of its food-stuffs"(9). This explains Pliny's famous complaint about allowing India "to find a market for her superfluous manufactured luxuries in Rome and thereby suck out her wealth and drain her of gold"(9).

MARITIME ACTIVITIES OF BENGALIS AND OTHERS

History bears testimony to the military, religious and maritime activities of the sons of Bengal of old, and in the magnificent sculptures of the Borobudur temple in Java the hand of the Bengali artist will be seen(10). The famous port of Tamralipta was the most important emporium of ancient Bengal, and it had extensive commercial intercourse by sea with the East and the West alike. It remained for years the home of Indian shipbuilding. There was considerable maritime activity from time to time also in other parts of India, and until the rise of British power her history as a maritime country has been an extremely chequered one. In the final lecture reference will be made to the dismal picture

(8) *Ibid*, pp. 128-129.
(9) *Ibid*, p. 127.
(10) *Ibid*, p. 109.

of the progress which India has made in the shipbuilding industry since obtaining Independence in 1947 and to the present unsatisfactory position of Indians as a maritime nation.

LECTURE II

THE CONTRACT OF CARRIAGE

TYPES OF DOCUMENT EMBODYING CONTRACT

A contract for the carriage of goods in a ship is called in law a contract of affreightment. Such a contract need not be in writing, but in practice it is usually expressed in writing, and most frequently in one or other of two types of document called respectively a *"charterparty"* and a *"bill of lading"*(1).

The word "charterparty" is derived from the expression *"carta partita"*, which in medieval Latin meant an instrument written in duplicate on a single sheet and then divided by indented edges so that each part fitted the other. The first use of the word has been traced to 1539 A.D., but the phrase *"chartre de freight ou endenture"* seems to have been used in 1375 A.D. In those early days when literacy was not very common in Europe or England indentures were widely used to avoid fraud, and charterparties were usually made under seal.

A "bill of lading" was at one time called a *"bill of loading"*, and, like a charterparty, it used to be by "indenture". The first use of the expression is said to have been made in 1599 A.D. The practice of issuing a set of three original bills of lading of the same tenor may be traced back to 1539 A.D. One of them is handed to the shipowner to form part of the "ship's papers" for the voyage and for the preparation of the ship's "manifest" ; another is sent by the shipper to the consignee of the goods shipped ; and the third is retained by the shipper. But the details are usually filled in by the shipper in all of them before presenting to the ship, and after checking they are signed on behalf of the shipowner.

The procedure which is usually followed before the issue of a bill of lading is as follows.

Goods are received by the ship in two ways, either alongside or into a shed. When goods are received into shed a dock receipt or wharfinger's receipt is given for such goods, and the goods are retained in the shed until required for loading. When goods are received alongside, a mate's receipt for water-borne cargo is given.

When mate's receipts are issued the shipping company will not issue bills of lading until such time as the mate's receipt is given in exchange.

Goods are tallied into the vessel by tally clerks, whose duty is to keep a check and list of all cargo stowed in the vessel.

Tallying is done by recording in books, on cards, or on sheets, the

(1) Halsbury's *Laws of England*, Simonds ed., Vol. XXXV, Art. 380.

mark, port, numbers, and number of packages, with any remarks regarding condition.

When the shipment of a bill of lading is received on board, the bill of lading is completed and the particulars are placed on the ship's manifest, i.e. the list of cargo on board the ship. This manifest must contain full particulars of marks, numbers, quantity, contents, shipper and consignee, with such additional particulars as may be required by the Consular authorities of the country to which the goods are being forwarded.

The freight account is made out and freight is chargeable according to weight or measurement, or ad valorem value, or otherwise.

CHARTERPARTY

VOYAGE CHARTER, TIME CHARTER

Now, a contract by charterparty is a contract by which an entire ship or some principal part thereof is let to a merchant who is called the charterer, for the conveyance of goods on a determined voyage to one or more places, or until the expiration of a specified period; in the former case it is called a "voyage charterparty", and in the latter a "time charterparty". Such a contract may operate as a demise of the ship herself, to which the services of the master and crew may or may not be superadded, or it may confer on the charterer nothing more than the right to have his goods conveyed by a particular ship, and, as subsidiary thereto, to have the use of the ship and the services of the master and crew(2).

A time charter is one in which the ownership and also possession of the ship remain in the original owner whose remuneration or hire is generally calculated at a monthly rate on the tonnage of the ship, while a voyage charter is a contract to carry specified goods on a defined voyage on a remuneration or freight usually calculated according to the quantity of cargo carried. In a time charter (not being a charter by demise) the charterer usually directs where the vessel is to go, and with what she is to be laden, but the owner remains in all respects accountable for the manner in which she is navigated.

CHARTER BY DEMISE

Charterparties by way of demise are of two kinds, depending upon whether the hull is the subject-matter of the charterparty or whether the ship passes to the charterer in a state fit for the purposes of mercantile adventure. In both cases the charterer becomes for the time being the owner of the ship; the master and crew are, or become to all intents and purposes, his servants, and through them the possession of the ship is in him. The owner, on the other hand, has divested himself of all control either over the ship or over the master and crew. His sole right is to receive the stipulated hire, and to take back the ship

(2) *Ibid*, para 381.

when the charterparty comes to an end. During the currency of the charterparty, therefore, he is under no liability to third persons whose goods may have been conveyed upon the demised ship or who may have done work or supplied stores for the ship and those persons must look only to the charterer who has taken his place(3).

A demise charterparty seems to be now obsolete. But whether a charterparty operates as a demise or not is a question of construction, the principal test applicable being whether the master is the servant of the owner or of the charterer. Even where the charterparty provides for the nomination of the master by the charterer, he must be regarded as the servant of the owner, if the effect of the charterparty is that he is to be paid or dismissed by the owner, and that he is to be subject to the owner's orders as to navigation. On the other hand, if the charterparty is otherwise to be regarded as a demise, it is immaterial that the owner reserves the right, in certain circumstances, of removing the master and appointing another in his place, or of appointing the chief engineer(4).

Charterparties by demise are seldom come across now-a-days, except perhaps in the oil tanker trade, and are necessarily of minor importance. It will be useful, therefore, to confine our attention to voyage charterparties and time charterparties only, and it will be seen that in both these cases the shipowner and the charterer, in spite of the fullest liberty to enter into contracts in any form of their choice, usually use, subject to necessary amendments, charterparties in the standard printed forms approved by very well-known bodies, such, for instance, as the Baltic and International Maritime Conference and the Documentary Committee of the Chamber of Shipping of the United Kingdom.

IMPLIED UNDERTAKINGS IN CHARTER

Now, in the case of a voyage charter the shipowner impliedly undertakes:

(*1*) to provide a seaworthy ship;

(*2*) that she shall proceed with reasonable despatch; and

(3) that she shall proceed without unjustifiable deviation.

And the charterer impliedly undertakes not to ship dangerous goods.

In the case of a time charter the shipowner impliedly undertakes that the vessel is seaworthy at the commencement of hire, while the charterer impliedly undertakes to use the vessel between good and safe ports and impliedly undertakes also not to ship dangerous goods.

"SEAWORTHINESS"

Now, in order to be "seaworthy" a ship must be fit in design, structure,

(3) *Ibid*, para. 382.

(4) *Ibid*, para. 384. Lord Esher's view expressed in *Baumvoll* v. *Gilchrist*, (1892) 1 Q.B. 253, that in the case of a charter by demise "it is a parting with the whole possession and control of the ship" was approved by the House of Lords. See (1893) A.C. 8.

condition, and equipment to encounter the ordinary perils of the voyage. She must also have a competent master, and a competent and sufficient crew. And if she sails from a port where a pilot may be procured, and the nature of the navigation requires one, she is, it would seem, not seaworthy without a pilot; unless the master himself has a competent knowledge of the navigation. Also, the cargo taken must be a safe cargo for such a voyage as may be reasonably expected; and it must be stowed so as not to be a source of danger. So also the ship must take in a safe supply of bunkers. She will be unseaworthy if she bunkers with low grade coal which is liable to spontaneous combustion during the voyage. If exceptionally bad weather is to be expected the standard of seaworthiness required is correspondingly high.

But the duty to supply a seaworthy ship is not equivalent to a duty to provide one that is perfect, and such as cannot break down except under extraordinary peril. What is meant is that she must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it. To that extent the shipowner undertakes absolutely that she is fit; and ignorance is no excuse. If the defect existed, the question to be put is: "Would a prudent shipowner have required that it should be made good before sending his ship to sea, had he known of it?" If he would, the ship was not seaworthy within the meaning of the undertaking(5).

The required standard of seaworthiness is relative, among other things, to the state of knowledge and standards prevailing at the material time. And if the ship is to carry goods of a particular kind, the implied warranty requires that the ship and her equipment be fit for the purpose of safely carrying those goods to their destination. Thus, where the contract is for the carriage of frozen meat in a ship fitted with refrigerating machinery, there is an implied warranty that the ship and refrigerating machinery are fit to receive and carry frozen meat safely on the agreed voyage(6):

In *Stanton* v. *Richardson*(6) a ship was chartered to take a cargo including wet sugar. When the bulk of the sugar had been loaded, it was found that the pumps were not of sufficient capacity to remove the drainage from the sugar, and the cargo had to be discharged. Adequate pumping machinery could not be obtained for a considerable time, and the charterer refused to reload. It was held that the ship was unseaworthy for the cargo agreed on, and, as she could not be made fit within a reasonable time, the charterer was justified in refusing to reload.

The undertaking as to seaworthiness is a *condition precedent*, and if the ship is unseaworthy before the voyage begins it will be open to the charterer to throw up the contract. But after the voyage has begun the charterer can claim damages only for any loss suffered as the result of

(5) *British Shipping Laws*, Vol. II, paras. 108, 109.
(6) *Ibid*, para. 112; *Stanton* v. *Richardson*, (1874) L.R. 9 C.P. 390.

the initial unseaworthiness of the ship. It is usually a clause in a charterparty that the ship is to be *"tight, staunch and strong, and in every way fitted for the voyage"*. This refers to the time at which the contract is made(7) or to the time of sailing *for* the port of loading, while the undertaking by law refers to the time of sailing *from* the port of loading: the express undertaking does not displace the implied one. And the burden of proving unseaworthiness is upon those who allege it.

"REASONABLE DESPATCH"

By his implied undertaking of "reasonable despatch" the shipowner impliedly undertakes that his vessel shall be ready to *commence* the voyage agreed on and to *load* the cargo to be carried, and shall *proceed* upon and complete the voyage agreed upon, with all reasonable dispatch. If by a breach of this undertaking there is such delay as "goes to the root of the whole matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship" the charterer may refuse to perform his part of the contract altogether(8).

In *Universal Cargo Carriers* v. *Citati*(8) by a voyage charterparty dated June 30, 1951, a ship was chartered to load at Basrah a quantity of scrap iron for carriage to Buenos Aires. By the charterparty it was provided that "cargo to be brought alongside in such a manner as to enable the vessel... to load... the cargo at the rate of 1,000 tons per weather working day... Time to commence 1 p.m. if notice of readiness is given before noon and at 6 a.m. next working day if notice given... after noon... notice of readiness to be given to shipper... Time lost in waiting for berth to count as loading time." The ship arrived at Basrah on July 12, but the charterer failed to nominate an effective shipper; so she was sent to the buoys where she remained until July 18. On July 18, three days before the lay days were due to expire under the charterparty, no cargo having been provided, the owners cancelled the charter, rechartered the ship to another charterer and ordered her away from Basrah. She sailed on July 23, the charterer's efforts to find a cargo having failed, and the owners having refused to accede to his demand to detain the ship.

The owners claimed damages before an arbitrator for breach of the charterparty. They justified the cancellation of the charter on the grounds (1) that the breaches alleged, namely, in failing to nominate a shipper or a berth or to provide cargo, were breaches of conditions, and (2) that the charterer's conduct amounted to a repudiation of the charterparty. The charterer denied any breach and counterclaimed for damages for wrongful repudiation by the owners.

The arbitrator held that the charterer had committed a breach of the charterparty by failing to nominate a shipper, but that it was a breach

(7) *Scott* v. *Foley*, (1899) 5 Com. Cas. 53.
(8) *Universal Cargo Carriers* v. *Citati*, (1957) 2 Q.B. 401.

of warranty entitling the owners only to damages; but that he had, by his conduct, evinced an intention not to perform the charterparty. He made an interim award on liability in favour of the owners subject to the decision of the court on the question whether on the facts found and on the true construction of the charterparty the owners were entitled to treat the charterparty as discharged. It was held by Devlin J.—

(*1*) that where no time was stipulated, the preliminary obligations under the charterparty had to be performed in sufficient time to allow the main obligation of loading to be completed within the prescribed time and as, on the facts found, the loading could not have been completed in the lay time remaining after July 18, by that date the time for nominating a berth and providing a cargo had expired and the charterer was in breach of both those terms; and in those circumstances it was not necessary to decide whether the nomination of a shipper was a term of the charterparty. Moréover, the charterer, by putting it out of his power to load the cargo within the lay time prescribed, had committed a further breach of the charterparty; but that none of the breaches committed were breaches of condition and, therefore, the owners were not ipso facto entitled to rescind;

(*2*) that the proper test to apply in order to decide whether delay in fulfilling obligations under a contract was so grave as to entitle the aggrieved party to rescind was whether that delay was such as to frustrate the commercial purpose of the venture; that "reasonable time" could only be accepted as the test where the period regarded as reasonable time was the same as the period necessary to frustrate; and therefore, as the arbitrator had based his award in favour of the owners on the finding that the charterer would be unable to perform within a reasonable time after the expiry of the lay days (which was less than the period required to frustrate) he had applied a test as to the delay necessary to amount to repudiation which was erroneous in law;

(*3*) that, while the application of the doctrine of frustration was a matter of law, the assessment by the arbitrator of the period of delay sufficient to constitute frustration was a question of fact, and could be attacked only if he had applied some wrong principle of law (which he had not);

(*4*) that an anticipatory breach of contract (on which the owners must rely) was (*a*) renunciation by a party of his liabilities under it, or (*b*) impossibility of performance, including when by his own act or default circumstances arose which rendered him unable to perform his side of the contract or some essential part of it;

(*5*) that as conduct could only be interpreted in the light of events known to the interpreter at the time, the owners had failed to establish that the arbitrator should properly have taken after events into account in determining the conduct of the charterer. Accordingly, the owners' claim on renunciation failed;

(*6*) but that the owners were entitled to succeed if they could prove

that the charterer had, on July 18, 1951, become wholly and finally disabled from finding a cargo before the delay frustrated the venture; it was immaterial whether the disablement was deliberate or not; but the determination of inability must be made in the light of all the events, occurring before and after the critical date, which were put in evidence at the trial.

His Lordship held further that there was no clear finding on which the question could be argued on the case as it stood as the award was directed to renunciation and not impossibility in fact and therefore, as the owners ought not to be debarred from taking the point and could now be allowed to do so without injustice to the charterer, the case would be remitted to the arbitrator for a further finding on the question whether the charterer was, on July 18, 1951, willing and able to perform the charterparty within such time as would not have frustrated the commercial object of the venture.

The case is different where a contract of affreightment is dissolved by implication on account of the frustration of the adventure due to unforeseen events totally unconnected with any breach of the contract by either party. For the effect of the frustration is different in the two cases: where there has been a breach of the implied undertaking of reasonable despatch resulting in frustration, *only the shipper is released* from his obligations; but where the frustration is independent of any breach, *e.g.*, where war subsequently breaks out, the release is mutual(9).

In *Jackson* v. *Union Marine Insurance Co.*(9) frustration was due to standing on rocks. The charterers, judging that the delay would be considerable, threw up the charter before the ship was refloated. The Court of Appeal upheld the judgment of first instance in which the charterers were held not liable to load the ship, the jury having found that the time necessary for repairing was unreasonably long.

"DEVIATION"

The essence of "deviation" is the voluntary substitution of another voyage for the contract voyage(10). If the route is not prescribed in the contract, the proper course for the ship is the ordinary trade route. Prima facie the route is the direct geographical route; but evidence is admissible to prove what route is a usual and reasonable route for the particular ship at the material time, provided that it does not involve any inconsistency with the express words of the contract. A route may be a usual and reasonable route though followed only by ships of a particular line and though recently adopted. Departure from the route so ascertained is justifiable if necessary to save life or to communicate with a ship in distress as the distress may involve danger to life, or if it is involuntary, *e.g.*, as the result of necessity; but in the absence of express stipulations

(9) Payne on *"Carriage of Goods by Sea"*, 8th ed. p. 17; *Jackson* v. *Union Marine Ins. Co.*, (1874) L.R. 10 C.P. 125, 144 (per Bramwell B.).
(10) *Rio Tinto Co.* v. *Seed Shipping Co.*, (1926) 42 T.L.R. 381.

to the contrary it is not justifiable, except in certain cases(11). Such cases are where the Carriage of Goods by Sea Act, 1925, applies or where there are express stipulations in the contract. Whether or not a particular deviation is reasonable is a question of fact in each case. The onus probandi in a case of alleged deviation follows this rule: when the cargo-owner proves the loss the carrier relies upon an immunity, and when the cargo-owner then establishes a deviation the carrier must show that the deviation was authorised by this rule. In general, an express liberty to deviate in the bill of lading is not affected by the Rules of that Act. But an unnecessary deviation, for the sole benefit of the carrier, is unreasonable(12).

In the recent case of *C. Czarnikow Ltd.* v. *Koufos*(12a) by a charterparty for the consignment of sugar from Constanza to Basrah it was agreed between the charterers and the shipowner that the ship, then in Piraeus, was expected ready to load in Constanza about October 25-27, 1960, all going well, and that it would proceed therefrom with all convenient speed to Basrah. Lay days for loading were not to commence before October 27 and if the ship was not ready to load by November 10 the charterers had the option of cancelling the charterparty. The charterers also had the option of discharging the cargo at Jeddah.

The ship arrived at Constanza, pursuant to the charterparty, on October 27 and left, having loaded the sugar, on November 1. The reasonably accurate prediction of the length of the voyage was 20 days. The shipowner knew that the charterers were sugar merchants and that there was a sugar market in Basrah but had no actual knowledge that the charterers intended to sell the sugar promptly after its arrival. In breach of the charterparty the ship deviated from the voyage by calling at Berbera, Bahrein and Abadan. Owing to those deviations the voyage was delayed by nine or ten days and the ship arrived at Basrah on December 2 instead of on November 22.

Prices on the sugar market at Basrah tended to fall in October and November to a low point in December.

In an arbitration the umpire awarded the charterers the difference between the price of the sugar when it should have been delivered and the price when it was actually delivered as damages.

The Court of Appeal upheld the umpire's award, and the House of Lords held that if ships delayed their voyage, the value of marketable goods on board the ships was likely to decline, and that therefore where there was delay in the delivery of marketable goods under a contract of carriage of goods by sea the measure of damages was the difference

(11) Scrutton on *"Charterparties and Bills of Lading"*, 17th ed. p. 259.
(12) *Stag Line* v. *Foscolo*, (1932) A.C. 328, 340, 343 (per Lord Atkin); *Renton* v. *Palmyra Trading Corporation*, (1956) 1 Q.B. 462; *Theiss Brothers* v. *Australian Steamships*, (1955) 1 Lloyd's Rep. 459. See also *C. Czarnikow Ltd.* v. *Koufos*, (1967) 3 W.L.R. 1491 H.L.
(12a) (1967) 3 W.L.R. 1491 (H.L.).

between the price of the goods at their destination when they should have been delivered and the price of the goods when they were in fact delivered. Accordingly, the charterers were entitled to recover that difference.

"DANGEROUS GOODS"

As regards "dangerous goods", the shipper impliedly undertakes that he will not ship goods likely to involve unusual danger without communicating to the shipowner facts which are within his knowledge indicating that there is such risk, if the owner does not and could not reasonably know those facts. But if the master or person in control of the ship chooses to receive the goods on board, knowing their nature, and the manner in which they are packed, the shipper will not be liable. Even though not physically dangerous, goods may be "dangerous" within this principle, if owing to legal obstacles as to their carriage or discharge they may involve detention of the ship. Thus, in a case the shippers knew that the cargo could not be discharged at the discharging port without the permission of the British Government, although they thought they might obtain that permission. They were unable to procure the permission, and the ship was delayed in consequence. It was held that the ship-owners, who did not know and could not reasonably have known that the permission was necessary, were entitled to damages in respect of the delay so caused(13).

"SAFE PORT"

A 'safe port" means a port to which a vessel can get laden as she is and at which she can lay and discharge, always afloat, that is, without touching the ground. It must be a port which is *politically* as well as *physically* safe, for the shipowner is not bound to risk confiscation by entering a port which has been declared closed. A temporary physical obstacle making the port icebound will not render it unsafe unless the ice is likely to remain for a period which will cause inordinate delay. Conversely a port which is only temporarily safe is not a 'safe port".

"PORT"

Perhaps it is not possible to give an exact definition of what constitutes a "port" for loading or discharging; but that a place may be a port, if seems that it should have somewhere for vessels to lie safely, and a shore where goods may be safely landed; also that there should be some conveniences for trade, such as wharves and warehouses; and that it should be a place to which vessels are allowed to come by the Government of the country(14).

(13) *Mitchell* v. *Steel*, (1916) 2 K.B. 610.
(14) *British Shipping Laws*, Vol. III, para. 976.

PRINCIPAL CLAUSES IN VOYAGE AND TIME CHARTERS

It will be interesting to mention now the following principal clauses to be found in most voyage and time charters(15):—

Voyage Charter	*Time Charter*
(*1*) The shipowner agrees to provide a ship and states her position, her capacity and class on the register.	(*1*) The shipowner agrees to provide a vessel for a period of time, and states her size, speed, fuel consumption, and amount of fuel on board.
(*2*) As to the preliminary voyage to the port of loading, the shipowner promises that the ship shall proceed with reasonable despatch.	(*2*) The port of delivery and the time of delivery of the vessel to the charterer are stated.
(*3*) The shipowner makes certain representations of fact regarding the ship, e.g. that she is "tight, staunch, and in every way fitted for the voyage."	(*3*) The charterer agrees to engage only in lawful trades and carry lawful merchandise, and only use good and safe ports.
(*4*) The shipowner undertakes to carry the goods to their destination.	(*4*) The shipowner agrees to pay for the crew's wages, for the vessel's insurance and her stores, and promises to maintain her in a thoroughly efficient state.
(*5*) The charterer agrees to provide a full cargo.	(*5*) The charterer agrees to provide and pay for fuel, to pay dock and harbour dues, and arrange and pay for loading and discharge.
(*6*) The charterer agrees to pay freight.	(*6*) The charterer agrees to pay a named sum for the hire of the vessel.
(*7*) A list of excepted perils.	(*7*) A clause concerning the redelivery of the vessel.
(*8*) Provisions regulating the manner of loading and discharge, and especially the time to be allowed for these operations, and rate of demurrage.	(*8*) Certain events are stated on the occurrence of which hire will cease to be payable.
(*9*) A cancelling clause, giving the charterer the right to cancel the contract in the	(*9*) The master is to be under the orders of the charterer.

(15) Payne, 8th ed., pp. 11, 12, 22, 23. For another comparative list, see Stevens on *"Shipping Practice"*, 6th ed.

Voyage Charter	*Time Charter*
event of non-arrival of the ship by a certain day at a certain port.	
(*10*) A "general paramount clause", the purpose of which is to incorporate the Hague Rules.	(*10*) The charterer agrees to indemnify the shipowner for loss or damage to the vessel by careless loading or discharge.
(*11*) The "amended Jason clause".	(*11*) A cancelling clause.
(*12*) A "both-to-blame collision clause."	(*12*) A clause incorporates the York-Antwerp Rules, 1950, relating to general average.
(*13*) An arbitration clause.	(*13*) An arbitration clause.
(*14*) A clause concerning payment of commission to the shipbroker for negotiating the charterparty.	(*14*) A clause concerning payment of commission to the shipbroker for negotiating the charterparty.
(*15*) A "cesser clause."	(*15*) A war clause.
(*16*) A war clause.	

Of the above clauses a *"general paramount clause"*, the *"amended Jason clause"*, a *"both-to-blame collision clause'*, a *"cesser clause"* and a *"clause incorporating the York-Antwerp Rules, 1950, relating to general average"* may require an explanation, which will follow.

PARTIES TO A CHARTER

The natural parties to a charterparty are the shipowner and the charterer, and where the charterparty is executed by both no difficulty arises. In practice, however, the contract is frequently made, on behalf of the owner, by the master, managing owner, or other agent, and, on behalf of the charterer, by a shipbroker or correspondent. A question then arises as to the respective rights and liabilities under the contract of the several principals and agents. Whether the agent was intended to be a party to the contract depends upon its language taken as a whole. If the signature is expressed to be 'for" or "on behalf of" a named person it will be inferred that the signatory was not intended to be a party to the contract, provided the language used in the rest of the charterparty does not clearly negative this inference and there is no proof of a custom making the signatory personally liable. Where the agent signs "as agent" without naming his principal the same result follows, even though in the body of the charterparty the agent is named as a party and the word "charterer" follows his name, provided the agent intended to bind an existing person. It seems that this is so even if the intended principal is resident abroad. Even if the language of the charterparty is such as to render the agent personally liable, he will be relieved from such liability if he can prove that before he signed the charterparty the other party expressly or impliedly agreed that the agent should incur no personal liability by signing. Whatever the terms of the charterparty or form

of signature, a person purporting to contract as agent will be personally liable if it can be proved that he was himself the real principal, and in such a case he will, it seems, also be entitled to sue on the charterparty in his own name(16).

EFFECT OF SIGNING "AS AGENTS"—PRINCIPAL'S LIABILITY

Universal S. N. Co. v. *James Mckelvie & Co.*

A charterparty was expressed to be made *"between T.H.S. & Co., agents for the owners"* of a steamer, *"and J. McK. & Co., Charterers,"* and was signed *"For and on behalf of J. McK & Co. (as Agents), J. A. McK"*. The steamer was to load a cargo of coal on the Tyne and proceed to a foreign port, and provision was made for the payment by the "charterers" of demurrage in the event of the steamer being detained beyond the stipulated time either at the port of loading or at the port of discharge. The charterparty contained numerous other provisions imposing obligations on "the charterers". The owners were aware at the time when the charterparty was signed that J. McK. & Co. were acting for other persons. In an action by the owners against J. McK. & Co. for demurrage at the port of discharge, it was held(17) that the defendants having signed as agents were not liable as principals to pay demurrage, notwithstanding that they were described as charterers in the body of the charterparty. This decision lays down the rule that where a principal exists, persons signing *"as agents"* are not personally bound as principals, although the principal is not named or is a foreigner.

PERSONAL LIABILITY OF AGENT

Kimber Coal Co. v. *Stone & Rolfe.*

The owners of a chartered ship sued the K. Coal Co. in the Sheriff Court for demurrage at the port of loading under a charterparty expressed to be entered into *"between G. T. G. & Co., owners' agents, and A. B. Co., Copenhagen, charterers"*. The charterparty, which was on a printed form, provided for payment of demurrage by "the charterers", and at the end of the charterparty the following stipulation was added in writing: *"Freight and demurrage (if any in loading) to be paid in Glasgow by the K. Coal Co. Ltd."* The charterparty was signed as follows: *"For the A. B. Co., Copenhagen, J. B. J., of the K. Coal Co. Ltd.* For and by telegraphic authority of owners, for G. T. G. & Co., J. M., as agents only." It was admitted that J. B. J. signed on behalf of the K. Coal Co. It was held—

(*1*) that the K. Coal Co., having been nowhere named in the charterparty as charterers, were not by reason of the form of the signature wherein reference to that company was only by way of description of the person signing made liable upon the charterparty, and (*2*) that the clause in

(16) *Halsbury*, Simonds ed. Vol. XXXV, paras. 386, 389.
(17) *Universal S. N. Co.* v. *James McKelvie & Co.*, (1923) A.C. 492, H.L.

writing did not import a promise of liability sufficient to rebut any inference to the contrary from the form of the signature(18).

S. 230, INDIAN CONTRACT ACT

Under the Indian Contract Act, Section 230, in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases:—

(*1*) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad:

(*2*) Where the agent does not disclose the name of his principal:

(*3*) Where the principal, though disclosed, cannot be sued.

NO STATUTORY DEFINITION OF "BILL OF LADING"

Turning now to bills of lading, it should be remembered that there is no statutory definition of "bill of lading". This is true of both Indian and English Acts. In one of its decisions(19) the Privy Council held that a document in a form beginning with the words *"Received for shipment on board"* was a "bill of lading" within the meaning of that phrase in Section 6 of the English Admiralty Court Act of 1861. Possibly a similar decision would be proper under the Bills of Lading Act. In any event, it is clear that a bill of lading is a well-known mercantile document of title which is transferred in the business world by endorsement passing to the endorsee good title to the goods covered by it(20).

There are two types of bill of lading at present in use: the first of which is the "received for shipment bill of lading"—in short, a "received bill of lading" which states that the goods have been received for shipment on board the steamship. Here there is no actual receipt for goods which have been shipped.

The second type is the shipped bill of lading. As will be seen in the Carriage of Goods by Sea Act, there is a stipulation that a shipper, if he so demands, shall have issued to him a shipped bill of lading when the cargo is loaded. This commences with the words "Shipped on board the steamship....." and states definitely that the goods are actually on board. Bankers are reluctant to accept documents that do not clearly set out this important statement, and many favour the "shipped" bills of lading. Many shipping companies now only print the shipped bills of lading.

The stamped bill of lading is the document proper—the plain or unstamped copy is of no value—and the master of the vessel is to deliver the goods to the person who produces the stamped bill of lading.

An unstamped charterparty will not be recognised by any Court. But

(18) *Kimber Coal Co.* v. *Stone & Rolfe,* (1926) A.C. 414.
(19) *The Marlborough Hill,* (1921) 1 A.C. 444.
(20) *A.S.N. Co.* v. *Jethalal,* A.I.R. 1959 Cal. 479.

a charterparty may be stamped after issue, while bills of lading must be stamped before they are issued.

THREEFOLD PURPOSE OF BILL OF LADING

A bill of lading serves a threefold purpose: in the first place, it is a *document of title* to the goods once they are shipped: secondly, it is a *receipt for the goods* delivered to the shipowner ; and lastly, it is *evidence of the contract* which has been entered into between the shipper of the goods and the shipowner.

(*a*) AS A DOCUMENT OF TITLE

As a document of title it enables the holder to obtain delivery of the goods at the port of destination and, during the transit, it enables him to "deliver" the goods by merely transferring the bill of lading. Thus, in a very well-known case(21) a contract was made for the sale of hops to be shipped from San Francisco to London, c.i.f. net cash. The buyer refused to pay for the goods until they were actually delivered. It was held that possession of the bill of lading is in law equivalent to possession of the goods, and that, under a c.i.f. contract, the seller is entitled to payment on shipping the goods and tendering to the buyer the documents of title.

A bill of lading is, in the words of Bowen L. J., "a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be"(22).

Prior to the enactment of the English Bills of Lading Act, 1855, the transferee of a bill of lading did not acquire any right to sue for a breach of the contract in his own name and was not liable to be sued upon the contract. It was to obviate this inconvenience that the said Act was passed. The Indian Bills of Lading Act, 1856, which closely follows the language of its English predecessor, was passed by the Indian Legislature with the same object in view.

Goods shipped under a bill of lading may be made deliverable to a named person, G, or to a name left blank, or *"to bearer"*, and in the first two cases may or may not be made deliverable *"to order or assigns"*.

Bills of lading making goods deliverable *"to order"* or *"to order or assigns"* are by mercantile custom negotiable instruments only in the popular sense that they are transferable, and the indorsement and delivery of them may affect the property in the goods shipped.

Indorsement is effected either by the shipper or consignee writing his name on the back of the bill of lading, which is called an *"indorsement in blank"*, or by his writing *"Deliver to E (or order), F"*, which is called an *"indorsement in full"*.

So long as the goods are deliverable to a name left blank, or to bearer, or the indorsement is in blank, the bill of lading may pass from hand

(21) *E. Clemens Horst* v. *Biddell,* (1912) A.C. 18.
(22) *Sanders* v. *Maclean,* (1883) 11 Q.B.D. 327, 341.

to hand by mere delivery, or may be redelivered to the shipper without any new transfer or indorsement, which would not be the case if there were a personal indorsement.

But the holder of the bill may at any time fill in the blank either in the bill or indorsement, or restrict by indorsement the delivery to bearer, such power being given to him by the delivery to him of such a bill of lading(23).

(*b*) AS A RECEIPT

In order to understand the function of a bill of lading as a receipt for the goods delivered to the shipowner it will be useful to note that a bill of lading is a printed document, and usually three or four copies thereof duly filled in form a set, each copy having identical terms filled on behalf of the shipper in the blank spaces to indicate the following, amongst other, details:—

(*i*) the name of the vessel which will carry the goods;
(*ii*) the ports of shipment and destination;
(*iii*) the name of the consignee, that is, the person to whom the goods are to be delivered;
(*iv*) a description of the goods;
(*v*) the shipping marks and numbers which have been put on the bales or cases or packages for the purpose of identification;
(*vi*) the number of bales or cases or packages;
(*vii*) the weight or measurement of the goods; and
(*viii*) the amount of freight and the time and place of payment thereof.

After completion of the above set the goods are brought alongside, that is, within reach of the ship's tackle, customs entries are made in a document known as "Bill of Entry" and the duties payable are paid, and the goods are put on board and each of the forms is signed and dated on behalf of the shipowner.

After shipment one copy of the bill of lading is handed to the shipowner to form part of the "ship's papers" for the voyage and for the preparation of the ship's "manifest". The other copies of the bill of lading are collected on behalf of the shipper, who insures the goods against marine and other risks and obtains a policy of insurance in respect thereof. The "shipping documents" in a contract for sale of goods upon c.i.f. terms consist of (*a*) a bill of lading, (*b*) the policy of insurance and (*c*) the invoice setting out, inter alia, particulars of the goods and the price payable. To these documents the shipper attaches a draft or bill of exchange drawn on the consignee or on a bank named by the consignee either at sight or otherwise(24).

The subject of a bill of lading as receipt involves consideration from three different angles of the cargo shipped, *viz.* (*1*) as to *quantity*, (*2*) as to *marks or quality*, and (*3*) as to *condition*.

(23) Scrutton, 17th ed., p. 169.
(24) Payne, 8th ed., pp. 1-3.

(*l*) *As to quantity.*—A description of the goods shipped is generally given in the bill of lading with a statement of the number of packages or cases, or of the quantity when the shipment is in bulk. This does not estop the shipowner from showing that the goods, or a part of them, were never actually put on board(25). Again, the shipowner is not estopped from denying that the weight of the cargo as stated in the bill of lading is not correct(26).

The use of the expression *"weight, contents and value unknown"* or *"weight, measurement, contents and value unknown"* or any similar expression in a bill of lading indicates that the bill is not even prima facie evidence of the matters included in such expression(27).

In *Attorney-General of Ceylon* v. *Scindia S. N. Co. Ltd.*(27) pursuant to an agreement between the Government of Ceylon and certain shipping lines providing for the carriage of rice from Burma to Ceylon, subject to the terms and conditions of the bills of lading, a number of bags were shipped on the respondent company's vessel at Rangoon for carriage to Colombo. The bills of lading, which applied the terms of the Indian Carriage of Goods by Sea Act, 1925—which provided that the bill of lading should be prima facie evidence of the receipt by the carrier of the goods as therein described—stated that *a total of 100,652 bags had been shipped* in apparent good order and condition, *"weight, contents and value when shipped unknown"*. The ship did not call at any intermediate port before reaching Colombo. On a claim by the appellant, the Attorney-General of Ceylon (as representing the Government), for damages for short delivery of 235 bags of rice from the ship the respondent pleaded, inter alia, that the entire quantity of the cargo shipped was discharged, and that in any case it was protected by the terms of the bills of lading. It was held, that though the statements in the bills of lading as to the number of bags shipped did not constitute conclusive evidence as against the respondent, they formed strong prima facie evidence that the stated number of bags was shipped unless there was some provision in the bills of lading which precluded that result, or very satisfactory rebutting evidence was produced by the respondent. The statement, viz. "weight, contents and value when shipped unknown", *was not a disclaimer as to the number of bags*, and the appellant was not disentitled by the conditions in the bill of lading from relying on the admission that bags to the numbers stated in the bills of lading were taken on board* and the respondent was accordingly under an obligation to deliver the full number of bags, and on the evidence had failed to do so.

The bills of lading were not, however, even prima facie evidence of

(25) *Smith* v. *Bedouin S. N. Co.*, (1896) A.C. 70.
(26) *Jessel* v. *Bath*, (1867) L.R. 2 Ex. 267.
(27) *New Chinese Antimony Co.* v. *Ocean S. S. Co.*, (1917) 2 K.B. 664 ; *Attorney-General of Ceylon* v. *Scindia S. N. Co. Ltd.*, (1962) A.C. 60 P.C. ; *Haji Shakoor* v. *B.I.S.N.*, I.L.R. 50 Mad. 804.

* See *Oricon* v. *Intergraan*, (1967) 2 Lloyd's Rep. 82.

the weight or contents or value of the bags, the proof of which was on the appellant. It was a reasonable and proper inference in all the circumstances that the bags that were shipped contained rice, and there was evidence, accepted by the respondent, that a full bag of rice weighed about 160 lb. There had, accordingly, been a short delivery of 235 bags of rice each weighing about 160 lb., and on the evidence neither the contents of those bags had been accounted for nor were the 235 empty bags themselves delivered. The appellant was therefore entitled to the damages claimed and not, as contended by the respondent, to the value of 235 empty bags only.

Travancore Bank Ltd. v. *G. E. Shipping Co. Ltd.*

Reference may be made here to the case of *Travancore Bank Ltd.* v. *Great Eastern Shipping Co. Ltd.* This case arose out of a shipment of 501 bags of black pepper from the port of Cochin to the port of Calcutta, covered by three bills of lading marked C_1, C_2 and C_3 for 101, 200 and 200 bags respectively, the plaintiff Bank being the pledgee and endorsee of C_2. In each bill of lading it was recorded under the particulars declared by the shipper that the packages were marked "SR" and the contents were ungarbled black pepper packed in double bags. When the cargo was discharged at Calcutta the ship's outturn report showed the landing of 423 bags of black pepper marked "SR": the balance consisted of 78 bags of pepper dust marked variously as "SMD", "MD", "SML" and "ML". The plaintiff took delivery of 150 bags marked "SR", and was offered 50 bags out of the 78 bags marked otherwise than as "SR", which it declined to accept. The plaintiff instituted the suit claiming damages for short delivery of 50 bags marked "SR" covered by its bill of lading.

The three bills of lading were in similar terms, each containing a clause in rubber stamp, stating *"Ship not responsible for marks, nil marks and contents"* and added below the particulars as to marks and contents declared by the shipper on the bill of lading. The printed clauses stated, inter alia, *"counter marks and numbers unknown"* and *"weight, contents and value when shipped unknown"*. The plaintiff claimed that all the 200 bags covered by its bill of lading were marked "SR" when shipped. The shipowner disputed this.

The case was first heard in the Calcutta High Court by A. N. Ray J., whose decision was against the shipowner. On appeal, P. B. Mukharji and H. K. Bose JJ. differed on all points of fact and law, including the interpretation of the bill of lading in question, and recommended, in view of the commercial and legal importance of the points involved, that the matter be decided by a larger Bench. Thereupon a Bench consisting of Bachawat, Sinha and P. N. Mookerjee JJ. heard the appeal, Bachawat and Sinha JJ. deciding in favour of the shipowner, and P. N. Mookerjee J. deciding against it.

H. K. Bose, Bachawat and Sinha JJ. held that the effect of the rubber stamp clause was that the shipowner admitted the receipt of the stated

number of packages, but refused to admit that they bore any marks or that they bore the marks declared by the shipper or that they contained the goods so declared. P. B. Mukharji and P. N. Mookerjee JJ. took the contary view. The points involved as well as relevant Indian and foreign decisions have been elaborately discussed in the judgments delivered and may be usefully studied. The matter is now pending before the Supreme Court for decision upon a question of construction of Clause 36 of the Letters Patent of the Calcutta High Court.

Section 3 of the Bills of Lading Act, English as well as Indian, prevents the person who has actually signed a bill of lading, or the person in whose name and with whose authority it has been signed, from disputing the accuracy of its statement of the kind and quantity of the goods shipped, in any proceeding between a consignee or endorsee for value and himself, unless he can bring himself within the proviso. It does not bind the shipowner when the bill of lading has been signed by his agents in their own names.

(2) *As to marks or quality.*—The master does not generally bind the shipowner by a description in the bill of lading of the mercantile quality of the goods, which, in so far as it is not apparent to an unskilled person, it is not the master's business to know. *It is not the master's duty to insert quality marks.* Hence, if he states them incorrectly, this does not prevent the shipowner from showing that goods of that quality were not put on board. All that the master has to do is to insert the "*leading marks*"(28).

"LEADING MARKS"

The expression "leading marks" means marks necessary to the *correct identification* of the goods. It may include quality marks where the actual goods cannot be identified except by reference to such marks(29). But, as held in the case of *Parsons* v. *New Zealand Shipping Co.*(30), it will not include marks that are not essential to the description and identificaton of the goods in a commercial sense.

Parsons' Case.

In *Parsons' Case*(30) frozen carcases of lamb were put on board, and the bills of lading, signed by the defendants, described the goods as "622X, 608 carcases, 488X, 226 carcases". On arrival, some carcases were found to be marked 522X and others 388X. The endorsee of the bill of lading argued that the defendants were estopped from denying the statement in the bill of lading and were liable for failing to deliver the carcases shipped. It was held by the majority of the Court of Appeal that the

(28) *Cox* v. *Bruce,* (1886) 18 Q.B.D. 147.
(29) *Compania Importadora* v. *P. & O.,* (1927) 28 Ll.L.R. 63.
(30) *Parsons* v. *New Zealand Shipping Co.,* (1901) 1 K.B. 548. See the observations of Romer L.J. at p. 571. See also *Madras Port Trust* v. *K.P.A.T.A. Nadar,* I.L.R. (1966) 1 Mad. 164.

marginal description of the goods in the bills of lading and the numbers of packages stated therein did not affect or denote the nature, quality or commercial value of the goods. In this case the marks were immaterial, and Kennedy J. who tried the case found that the lambs marked 522X were of the same character and value, as commercial articles, as those marked 622X ; and that the *first figure in the mark had no distinctive value in the meat market : it had merely a private significance to the shippers.*

Section 3 of the Bills of Lading Act, Indian as well as English, does not preclude the person who has signed the bill of lading from showing that the goods shipped were marked otherwise than as those stated, unless the marks were essential to the identity of the goods. Marks on the goods which, so far as the purchaser is concerned, have no meaning, and could only be referred to in the bill of lading in order to assist the more sure or speedy identification or delivery of the goods, do not form part of the description of the goods, within the meaning of this section, so as to bind the signer of the bill of lading by way of estoppel. But where marks convey a meaning as to the character of the goods, and are therefore essential to the identity of the goods, and it is on the faith of those marks that an endorsee of a bill of lading takes it up under a contract of sale, the person signing the bill will be estopped by this section from proving that goods with those marks were not shipped under the bill.

(*3*) *As to condition.*—"Condition" as distinguished from "quality", means the *apparent or external condition* of the goods, which the master is bound to notice.

The expression *"shipped in good order and condition"* used in a bill of lading amounts to an admission by the shipowner that, so far as he and his agents had the opportunity of judging from the exterior, the goods were so shipped(31). But the shipowner will not be estopped from proving that the internal condition of the goods was bad(32), and there is no estoppel if the statement on which it is founded is not sufficiently clear, as where the bill of lading was endorsed in the margin with the words *"signed under guarantee to produce ship's clean receipt"*(33). A "clean bill" is one in which the expression "shipped in good order and condition" is *not claused* in any way(34).

The estoppel will operate in favour of the endorsee for value of the bill of lading and also in favour of one to whom it has been pledged as security for an advance(35). But the estoppel will operate only if the holder of the bill of lading relied on the statement in the bill. If the

(31) *The Freedom,* (1871) L.R. 3 P.C. 594.
(32) *The Tromp,* (1921) P. 337.
(33) *Canadian* v. *Canadian,* (1947) A.C. 46, 56.
(34) *Canadian* v. *Canadian,* (1947) A.C. 46, 54 ; *Ellerman* v. *Sha Bhogajee,* (1961) 2 M.L.J. 97 : A.I.R. 1961 Mad. 442.
(35) *Brandt* v. *Liverpool,* (1924) 1 K.B. 575 ; *Brown Jenkinson* v. *Percy Dalton,* (1957) 2 Q.B. 621.

consignee is also the shipper, he cannot rely on the statement as to the condition of the goods in the bill of lading as conclusive, though it would be prima facie evidence against the shipowner(36).

The words "shipped in good order condition" are not by themselves words of contract(37), and read with the words following, viz. "to be delivered in like good order and condition", do not amount to a contract to deliver "in good order and condition"(38).

"MATE'S RECEIPT"

A "mate's receipt" is a temporary form of receipt given by the mate of a ship for goods which have been received on board. This receipt is subsequently handed to the shipowner or his representatives in exchange for the bills of lading.

In the case of *Canadian* v. *Canadian*(33) a "received for shipment" bill of lading in respect of a quantity of sugar shipped on the respondents' steamship stated that the sugar was "received in apparent good order and condition", but contained on the margin a stamped endorsement *"signed under guarantee to produce ship's clean receipt"*. The sugar, which had been lying for some time at the wharf, had suffered some damage before shipment, and the ship's receipt stated "many bags stained, torn and resewn ". The sugar having been delivered in a damaged condition the appellants, as indorsees of the bill of lading, alleged, inter alia, that the respondents were estopped from saying that it was shipped in other than "apparent good order and condition", and they claimed a declaration of liability and a reference to assess the damages. It was held that a question of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities, and the whole case of estoppel fails if the statement on which the alleged estoppel is founded is not sufficiently clear and unqualified. On that basis the language of the bill of lading, read fairly and as a whole, was not such as to found an estoppel, the statement as to apparent good order and condition being qualified. Accordingly, there being no ground for holding the respondents guilty of any breach of contract or duty in regard to the carriage of the sugar, and, indeed no reason to find that it was actually damaged on the voyage, the claim failed.

In that case(33) it was further observed by the Privy Council that it did not see any reason to dissent from the view of Scrutton L. J. expressed in *Silver* v. *Ocean Steamship Company* (1930) 1 K.B. 416, at p. 425, that r. 4 of Art. III of the rules scheduled to the Carriage of Goods by Sea Ordinance, which provides that "such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described

(36) *The Peter de Grosse*, (1876) 1 P.D. 414; *Crawford & Law* v. *Allan Line*, (1912) A.C. 130.
(37) *Compagnia Naviera* v. *Churchill & Sim*, (1906) 1 K.B. 237.
(38) *The Skarp*, (1935) P. 134.

in accordance with para 3(a), (b) and (c)", has not the effect of allowing the shipowner to prove that goods which he has stated to be in apparent good order and condition were not really in apparent good order and condition as against people who accepted the bill of lading on the faith of the statement contained in it.

A "mate's receipt" is prima facie evidence of the quantity and condition of the goods received. It is not conclusive and its statements do not bind the shipowner. It is not a document of title to the goods shipped(39).

(c) AS EVIDENCE OF THE CONTRACT

Where a ship is used, either by the shipowner or by her charterer, to carry the goods of a number of persons under different bills of lading, she is said to be employed as a "general ship".

Where the charterer is also the shipper, the rights of shipowner and charterer as such will be governed by the charterparty alone. The bill of lading cannot vary or add to the terms of the charterparty unless it contains an express provision to that effect.

But where the charterer puts the ship up as a general ship the contract of carriage will in each case be evidenced by the bill of lading given to each shipper, irrespective of the terms of the charterparty, save where there is an express agreement to the contrary. Further, in the case of a general ship, if a shipper knew of the existence of a charterparty, he is taken to have contracted with the charterer and can sue or be sued by him ; if he did not, his contract is with the shipowner(40).

It is usual for the master or agent of the ship to give bills of lading for the cargo, although it may be shipped under a charterparty. When the charterer himself ships the goods, these bills of lading have been held to operate as receipts for them, and also as documents of title which he can negotiate, and thereby constructively transfer the possession of the goods.

In the case of *N. Y. Kaisha* v. *Ramjiban*(39) the respondents, having entered into contracts with certain mills for the purchase of a quantity of bales of gunnies, sold the like quantity on the same day to a company who, in due course, booked freight space with the appellants, shipowners, for carriage of the goods to Japan on two of their vessels. The shipping order stipulated that the mate's receipts must be exchanged for bills of lading. All the contracts—of purchase and re-sale—provided for delivery free alongside export vessel at Calcutta, and contained conditions that payments were to be made in cash in exchange for mate's receipts, and that, so long as the mate's receipts were in possession of the sellers, the lien of the sellers, as unpaid vendors, subsisted both on the mate's receipts and the goods they represented until payment in full.

The company gave shipping instructions to the respondents, who passed them on in the same terms to the mills, and in due course the goods were

(39) *N. Y. Kaisha* v. *Ramjiban*, (1938) 65 I.A. 263, 279.
(40) Payne, 8th ed., p. 41

shipped, and the mate's receipts therefor, in the name of the company as shippers, were delivered to the mills' representatives. On the same and the following day, however, the appellants, having taken a letter of indemnity from the company, issued to the company the respective bills of lading without the mate's receipts being given in exchange. A few days later the respondents, having paid the mills for the goods, obtained possession of the mate's receipts, which they then tendered to the company, but the latter defaulted in payment. The respondents thereupon notified the appellants in writing that they had an unsatisfied lien or claim for the price of the goods and were entitled to retain the relative mate's receipts, and that bills of lading must not be issued until the mate's receipts were surrendered to them (the appellants). By that time, however, the company, having the bills of lading in their possession, had re-sold the goods to purchasers in Japan, to whom they were subsequently delivered by the appellants on presentation of the bills of lading. On a claim by the respondents against the appellants for (inter alia) damages, it was held that the sale being of unascertained goods the property in them passed under the contract when the goods were appropriated by delivery alongside the vessel. The respondents had then parted with both property and possession, and the lien they held was therefore an equitable and not a common law or possessory lien, and was only enforceable by equitable remedies against the company. All that the respondents had was possession of or a lien on the mate's receipts, which was not a document of title to the goods shipped. Although prima facie the possessor of the mate's receipts is entitled to have the bills of lading issued to him, where in fact the mate's receipts acknowledged receipt from the company, who had contracted for the freight, and the property in the goods was in the company, the appellants were prima facie bound to deliver the bills of lading to the company.

There had been no timeous express notice to the appellants, or any ground for imputing implied notice, not to issue bills of lading, and the case was one in which the appellants, who for their own protection had stipulated with the shippers that bills of lading were to be given in exchange for mate's receipts, had waived that provision, and without notice had issued bills of lading to the named shippers and owners of the cargo, and in such circumstances they could not be held responsible.

It was held further in that case on the footing that the bills of lading were delivered to the company, that the holding of the mate's receipts by the respondents only gave them an equitable lien which did not affect the transferee of the bills of lading so as to found a claim for conversion.

EFFECT OF ENDORSEMENT OF BILL OF LADING

Where on the other hand bills of lading are given to a shipper, not being the charterer or his agent, and he endorses them to the charterer, the bills of lading become the governing documents in a claim by the charterer against the shipowners for damage to the goods.

In *Temperley S. S. Co.* v. *Smyth & Co.** Sir Richard Henn Collins, M.R. said:

"The broad distinction between the position of a charterer, who ships and takes a bill of lading, and an ordinary holder of a bill of lading is, I think, that in the former case there is the underlying contract of the charterparty which remains until it is cancelled, and taking a bill of lading does not cancel it in whole or in part unless it can be inferred from the inconsistency of the terms of the two documents that it was intended to do so. On the other hand, in the case of the holder of the bill of lading who is not the charterer there is no presumption that he contracts in any terms but those of the bill of lading, and, if the bill of lading purports to import the charterparty, the presumption is that it incorporates only those clauses which relate to the conditions to be performed by the receiver of the goods".

And in *T. W. Thomas & Co.* v. *Portsea S. S. Co.*** Lord Gorell observed:

"It seems to me that the clause of arbitration ought properly to be confined, as drawn, to disputes arising between the shipowner and the charterer".

The above passages were referred to by Megaw J. in the recent case of the *President of India* v. *Metcalfe Shipping Co. Ltd.**** There it was provided by clause 17 of a charterparty, by which the defendants' vessel *The Dunelmia* was chartered for the purpose of carrying to India a cargo of urea purchased by the charterers from Italian sellers, that any dispute arising under the charter was to be settled by arbitration. By the terms of the sale contract the risk in the urea was not to pass to the charterers until the bill of lading had been delivered to them in London; payment was then to be made within 20 days. The cargo was placed on board by the sellers who took order bills of lading. The bills were then indorsed in blank and sent to the charterers and payment was duly made. Later a dispute arose between the charterers and the shipowners over an alleged shortage of the cargo upon discharge. The further question then arose whether such dispute fell to be determined by arbitration, the charterers saying that it did and the owners saying that it did not. By agreement this matter was referred to an arbitrator who made an award adverse to the charterers.

On a special case stated to the commercial court Megaw J. held that although the bill of lading had achieved contractual status in the hands of the shippers and had subsequently been indorsed by them to the charterers, that made no difference to the concept that, in respect of the carriage of goods specified in it, the charterparty was the primary contract between charterer and shipowners; the taking of a bill of lading did not, in the absence of any inconsistency between it and the charterparty

* (1905) 2 K.B. 791, 802.
** (1912) A.C. 1, 9.
*** (1969) 2 W.L.R. 125, 136, 137.

terms, lead to any cancelling of that underlying contract, so that, there being no such inconsistency in the present case, the arbitration clause in the charterparty continued to be operative and the dispute as to short delivery fell to be determined under it.

When a bill of lading given to the charterer has been transferred for value to third persons, who are strangers to the charterparty, its terms become very important. It then constitutes an undertaking on the part of the shipowner with the holders, which is independent of the charter-party, except so far as that is expressly incorporated in it; and that is so, although the holders may have notice, from the bill of lading itself, that a charterparty is in existence. The effect of such transfer seems to be that a new contract springs up between the ship and the transferee of the bill of lading on the terms of the bill of lading, and the transferee is apparently enabled to sue on it for breaches of the contract appearing in it even before its transfer to him (when, indeed, it was no more than a receipt in the hands of the charterer).

"THE MASTER SHALL SIGN WITHOUT PREJUDICE TO THE CHARTERPARTY"

The meaning of the stipulation that the master shall sign bills of lading seems to be that the shipowners shall, through the master, contract with shippers for the *charterer's benefit*; and *not that the master shall do so as agent for the charterer*(41).

The common clause that the master shall "sign bills of lading as required by the charterer, *without prejudice to the charterparty*" means that notwithstanding any engagements made by the bills of lading, the contract between the parties to the charter is to stand unaltered.

"OTHER CONDITIONS AS PER CHARTERPARTY"

When the words *"other conditions as per charterparty"* are found in a bill of lading the effect of those words is to introduce into the bill of lading all those conditions of the charterparty as would operate as against the consignee. The practical mode of carrying out this principle is this: one must first read into the bill of lading all the conditions of the charterparty; if some of those conditions are so large as not to be applicable to a bill of lading at all, they are to be treated as inconsistent, and must be struck out(42).

"THROUGH BILL OF LADING"

A passing reference may be made now to what is known as a "through bill of lading", which is one made for the carriage of goods from one place to another by several shipowners or railway companies.

(41) *British Shipping Laws*, Vol. II, paras. 404, 405, 406, 412.

(42) *Serraino* v. *Campbell*, (1891) 1 Q.B. 283, 289 (per Lord Esher M.R.); *Hamilton* v. *Mackie & Sons*, (1889) 5 T.L.R. 677 (per Lord Esher M.R.); *T. W. Thomas & Co.* v. *Port Sea Steamship Co.*, (1912) A.C. 1, 9 (per Lord Gorell); *Dwarkadas* v. *Daluram*, (1949) 54 C.W.N. 544. But in *Son Shipping Co.* v. *De Fosse & Tanghe*, (1952) American Maritime Cases 1931, U.S. Court of Appeals did not approve the view expressed in (1912) A.C. 1.

The contract in such bill of lading to carry for the whole distance is one contract made with the company signing and delivering the bill of lading, and in the absence of express provisions that company would be liable for loss occurring on any part of the journey.

The freight also, if paid in advance, is usually payable for the whole journey, and should the goods be lost on one of the stages, the shipper is not entitled to a pro rata return of the freight for other stages, as if the consideration had failed.

In recent times it has become a common practice for the through bill of lading to contain a provision incorporating "all conditions expressed in the regular forms of bills of lading in use by the Steamship Company" performing the ocean carriage. In such a case, though the result is often obscure, the general position seems to be that the terms of such regular bill of lading will apply to the sea carriage, and the original contracting party, if still liable in respect of the sea carriage, will be able to rely on the exceptions contained therein(43).

It is common in through bills of lading to stipulate that, so far as the ocean transit is concerned, the property carried shall be subject to the terms of the form of bill of lading in use by the steamship company which performs the ocean carriage. If, as frequently happens, the terms of the two bills of lading are inconsistent, the provisions of the ocean bill of lading must, in such a case, prevail(44).

"CLEAN BILL OF LADING"

Before concluding this lecture it will be useful to mention that a "clean bill of lading" has never been exhaustively defined, but that it may be said to be one that does not contain any reservation by way of endorsement, clausing or otherwise as to the apparent good order or condition of the goods or the packing(45).

"SHIP'S HUSBAND"

Formerly the managing owner of a ship appointed by the other owners to do what was necessary to enable the ship to prosecute her voyage and to earn freight was called "the ship's husband". The expression is now used usually to mean a servant of the shipowner who undertakes the special duty of looking after the ship's equipment and outfit.

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(43) Scrutton, 17th ed., p. 69.
(44) *British Shipping Laws*, Vol. II, para. 201.
(45) *British Imex* v. *Midland Bank*, (1958) 1 Q.B. 542; *Ellerman* v. *Sha Bhogajee*, (1961) 2 M.L.J. 97: A.I.R. 1961 Mad. 442. On appeal: A.I.R. 1966 S.C. 1892.

LECTURE III

THE CONTRACT OF CARRIAGE

We shall now refer to representations, conditions and warranties relating to the contract of carriage.

REPRESENTATIONS MAY BE CONDITIONS OR WARRANTIES

Now, representations inducing the signing of a charter may or may not be embodied in the charter, and statements embodied in the charter may be of existing facts or may be promises for the future. Such statements may be either conditions or warranties. If conditions, they are essential parts of the contract, the breach of which entitles the other party to repudiate the charter as well as to recover damages consequential upon the breach. But if warranties, they are what one party has promised to be true or has undertaken to perform, and their breach gives rise to an action for damages only, except where the event to which the breach gives rise is such as to frustrate the commercial purpose of the contract(1).

PROMISSORY AND NON-PROMISSORY REPRESENTATIONS

A charterparty usually commences with a description of the ship, giving her nationality, character, class, and capacity and some statement of where she is lying, or how she is occupied, at the time the contract was entered into. These are representations made by the shipowner; being matters within his knowledge, or means of knowledge, and not within the knowledge of the charterer. And they may amount to warranties, or promises by the shipowner that the facts are as represented; or they may be mere recitals identifying the subject-matter of the contract, or bare representations which only become significant when it is sought to show that the charterer has been induced to contract by misrepresentation.

Whether a representation contained in the document does or does not amount to a warranty by the shipowner, depends upon the presumable intention of the parties, to be gathered from the form of the contract, and the circumstances under which it was made. The whole scheme of the contract must be considered: its subject, its objects and the relations of the parties to one another. If from this point of view the reasonable supposition is that the representation was relied upon by the charterer when he entered into the contract, and that the shipowner who made it expected, or should have expected, that it would be so

(1) Scrutton, 17th ed., pp. 71-72.

relied upon, then the representation amounts to a promise. It is a warranty that the fact is as stated, and if not satisfied, and damages result in consequence to the charterer, he may recover in respect of them.

A representation may also amount to a condition precedent to the charterer's obligation to load. The fact represented may be so material to him that obligation will become a substantially different thing from what he meant to undertake, if it prove untrue. In that case he will, on discovering the truth, be at liberty to refuse to load. Generally, therefore, it may be said that if a descriptive statement is so material as to be regarded as a promise, it is also a condition which must be satisfied, if the charterer is to be bound by the contract(2).

Behn v. *Burness.*

A ship was chartered on October 19 as "the S. now in the port of Amsterdam.... should with all possible dispatch proceed to Newport and there load." On October 15 the S. was at Niewdiep, 62 miles from Amsterdam, and could have arrived there in twelve hours; but, owing to contrary winds and absence of steam-power, she did not arrive at Amsterdam till the 23rd. She discharged as quickly as possible, and reached Newport on December 1. The charterers refused to load. It was held, that it was for the judge to construe this contract and decide as to the materiality of its statements, being influenced not only by its language, but also by the circumstances under which, and the purposes for which, it was entered into, which circumstances and purposes were to be found by the jury. It was held also that in this case the evidence showed that the time of the ship's arrival to load was an essential fact for the charterer to know, and that the position of the ship at the time of entering into the charter was the only datum from which the charterer could calculate the time of the ship's arrival. It was held further that the truth of the words *"now in the port of A"* was, therefore, a condition of the contract fundamental to the obligation of the charter, and their untruth entitled the charterer to repudiate it(3).

Some of the terms which are usually held to be conditions are the following :—

(*i*) the position of the ship at the date of the charterparty ;
(*ii*) her time of sailing ;
(*iii*) her nationality ;
(*iv*) her class on the register ;
(*v*) her capacity for a particular cargo ;
(*vi*) the date when she is "expected ready to load".

SAME PRINCIPLES APPLY TO BILLS OF LADING AND CHARTERPARTIES

The principles hereinbefore mentioned apply to statements in bills of

(2) *British Shipping Laws*, Vol. II, paras. 344, 345, 346.
(3) *Behn* v. *Burness*, (1863) 122 E.R. 281.

lading though in practice these seldom have to be treated as conditions because (*i*) as a rule their untruth is not discovered until after the ship has sailed, so that the shipper has lost his opportunity of treating the contract as at an end and reclaiming his goods, and (*ii*) such statements are rarely important to original shippers(4).

RULES OF CONSTRUCTION SAME FOR CHARTERS AND BILLS OF LADING

Rules of construction of charterparties are equally applicable to the construction of bills of lading, and a charterparty is to be construed in such manner as to give effect, as far as possible, to the intention of the parties as expressed in the written contract.

ORDINARY AND POPULAR SENSE

The words used are to be understood in their plain, ordinary and popular sense, unless they have generally, in respect of the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the contract evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense(5).

PECULIAR MEANING WHEN APPLICABLE

Where it is shown that a term has acquired a peculiar meaning in a particular trade, it is prima facie to be taken as used in that sense when used in relation to that trade(6). So, where freight on cotton was payable at the rate of "£3 15s. per ton of 50 cubic feet delivered", and the cotton having been hydraulically pressed before shipment at the loading port Bombay consequently expanded on delivery, it was held that freight was payable on the quantity delivered as loaded and not on the measurement after discharge(7).

Again, the meaning given by persons engaged in commerce to a particular geographical term may show the effect it was intended to have. Thus, in an action on a policy it was held that the Gulf of Finland was considered by nautical and commercial men to be within the Baltic, though it was not so regarded by geographers(8).

EJUSDEM GENERIS RULE

The rule is that where general words follow particular words which are species of a single genus, the general words are prima facie descriptive only of other species of the same genus, or, as it is otherwise put, the general words are construed *ejusdem generis*. The tendency of modern decisions, including those relating to contracts of affreightment, is to

(4) Scrutton, 17th ed. p. 73.
(5) *Robertson* v. *French*, (1803) 4 East 130, 136 (per Lord Ellenborough).
(6) *Myers* v. *Sarl* (1860) 3 E. & E. 306, 319 (per Blackburn J.).
(7) *Buckle* v. *Knoop*, (1867) L.R. 2 Ex. 125, 333.
(8) *Uhde* v. *Walters*, (1811) 3 Camp. 16.

attenuate the application of the *ejusdem generis* rule. And where the extent of an exception, e.g. a bill of lading exception, is uncertain, it is construed most strongly against the party for whose benefit it was introduced(9).

DOCUMENT TO BE CONSTRUED AS A WHOLE, AND WORDS ARE TO BE UNDERSTOOD THAT THE OBJECT MAY NOT FAIL

The document is to be construed as a whole, but as the contract is made on printed forms which are usually framed to suit a diversity of cases, it becomes necessary to make written additions or alterations to meet the requirements of particular cases. But in doing so clauses are not infrequently allowed to remain by commercial draftsmen, although they do not apply to the case or are in conflict with the intention of the parties. In such a case it is not necessary to give such a meaning to the words used as will make the inapplicable clause operate, for words are to be understood that the object may be carried out and not fail. This is expressed by the maxim *verba ita sunt intelligenda ut res magis valeat quam pereat*. This maxim, however, will not allow the court to make a contract for the parties, or to go outside the words they have used, except in so far as these are appropriate implications of law(10).

Adamastos Case

In the case of *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.*(11) a tanker was chartered by an oil company, under a charter expressed to remain in force for as many consecutive voyages as the vessel could tender for loading within a period of 18 months, to carry cargoes of oil all over the world at specified rates of freight per ton per voyage or a return cargo of fresh water at a lump sum. Clause 1 of the charterparty provided that the vessel "being tight, staunch and strong and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted, shall with all convenient despatch sail and proceed to" a nominated port and there load a cargo of oil. The following clause was incorporated in the charterparty by a typed slip: "Paramount clause. This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the United States, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further". The owners, exercising due diligence, selected and appointed an engine-room staff, but that staff proved incompetent, and by reason of their incompetence (amounting to unseaworthiness) the vessel broke down on

(9) *Burton* v. *English*, (1883) 12 Q.B.D. 218.
(10) *Hillas* v. *Arcos*, (1932) 147 L.T. 503, 514, (per Lord Wright).
(11) (1959) A.C. 133.

the first voyage to her loading port, and other similar incidents followed, with the result that the charterers lost the services of the vessel during 106 days. Invoking the United States Act, the owners claimed that their obligations as to seaworthiness were limited to the exercise of due diligence, as therein provided. The House of Lords held that, on the true construction of the charterparty, the United States Act affected the rights and liabilities of the parties under the contract, despite the use of the words "This bill of lading....." on the typed slip, which words, in accordance with the common meaning and intention of the parties, should be read as if they were "This charterparty.....", and that the words in section 5 of the Act "The provisions of the Act shall not be applicable to charterparties" must be rejected as being meaningless. In the course of his judgment Lord Morton of Henryton observed as follows:—

'My Lords, I must now approach the construction of the relevant documents and endeavour to answer the four questions already stated. In approaching this task I shall bear in mind, and strive to apply, three well-known principles of construction, to which reference was made in the course of the argument. The first principle is stated by Lord Wright in *Hillas & Co. Ltd.* v. *Arcos Ltd.*(10) in words which have often been quoted: "Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defect; but, on the contrary, the court should seek to apply the old maxim of English law, *Verba ita sunt intelligenda ut res magis valeat quam pereat.**" These observations were made in a case where the question was whether a contract had been made: but Mr. Roskill, for the owners, submitted that they were equally applicable to the construction of a concluded contract, and I agree.

'Lord Wright then goes on to state the second well-known principle as follows: "That maxim, however, does not mean that the court is to make a contract for the parties, or to outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail."

'The third principle was stated by Lord Loreburn in *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*(12): "The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain; and such a contract is

*The Latin expression means: Words are to be understood that the object may be carried out and not fail.

(12) (1908) A.C. 16, 19, 20.

not proved by producing language which may mean that and may mean something different"; and he added: "I am afraid it is useless to draw the attention of commercial men to the risks they run by using confused and perplexing language in their business documents. Courts of law have no duty except to construe them when a question arises; but it is often very difficult. And sometimes what the parties really intended fails to be carried out because ill-considered expressions find their way into a contract".

Again, if the printed and written (or typed) parts of the contract are in conflict, greater effect is as a rule given to the parts that are written: for they show the matters which were more particularly under consideration, and which formed more specially the objects of the parties in making the contract(13).

Where the terms of one document are incorporated in toto into another, the principle of construction is that only the provisions of the former applicable to the latter are to be taken as incorporated therein and the other provisions of the former are to be disregarded(11).

And it is permissible so to construe a contract as to strike out a meaningless term, provided it has not yet been agreed(14).

Sassoon's Case

Ambatielos v. *Jurgens*

In *Sassoon* v. *International Banking Corporation*(15) the Privy Council held that it was well settled that the words deleted in a printed form of mercantile contract were to be treated as if they had never formed part of the print at all. Again, in *Ambatielos* v. *Jurgens*(16) it was held by Lord Finlay that the deleted words must not be looked at. This does not apply where reference to deleted words is made in words retained(17).

In the case of *The Brabant*(13) shipowners chartered a vessel for one round voyage, knowing that the vessel was to carry a cargo of wood-pulp. The charterparty, in the Baltime* form, contained the following provisions: Clause 9:

> "The charterers to indemnify the owners against all consequences or liabilities arising from the master.....signing bills of lading or other documents....."

Clause 13:

> "The owners only to be responsible.....for loss or damage to goods on board, if such.....loss has been caused by want of due diligence on the part of the owners or their manager in making the

(13) *British Shipping Laws*, Vol. II, para. 527. See *The Brabant*, (1966) 2 W.L.R. 909, 917.
(14) *Nicolene* v. *Simmonds*, (1953) 1 Q.B. 543 C.A.
(15) (1927) A.C. 711.
(16) (1923) A.C. 175.
(17) *Reardon Smith Line* v. *Central S. B. Corporation*, (1932) 42 Ll.L.R. 284.

* See Appendix.

vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the owners or their manager. The owners not to be responsible in any other case nor for damage.....whatsoever and howsoever caused even if caused by the neglect or default of their servants."

Among a number of special typed clauses was clause 28, which read:

"The decks and holds and other cargo spaces to be properly cleaned at owners' risk and expense before loading."

Before the vessel was tendered and accepted for service under the charterparty, the vessel had carried a cargo of petroleum coke which had left coal dust in the holds and, although the owners' servants had cleaned the holds, coal dust remained and damaged the woodpulp. The owners were liable to the holders of the bills of lading, which under Swedish law incorporated The Hague Rules, for the damage to the goods resulting from their servants' negligent cleaning of the holds.

On the question whether the owners could recover from the charterers under the charterparty the amount they had paid to the holders of the bills of lading, it was held that clause 28 prevailed over clause 13 where they were in conflict, for in case of doubt greater force was to be given the language and terms selected by the parties for the expression of their meaning rather than the printed words which were a general formality adapted by the parties to their case and that of all the other contracting parties upon similar occasions and subjects; that under clause 28 the owners were liable for any damage resulting from their servants' failure properly to clean the holds of the vessel and, although clause 13 limited the owners' liability under the charterparty to a personal liability and excluded liability for the acts or omissions of their servants, it did not have the effect of limiting their liability under clause 28 to personal liability only. Accordingly, the owners were not entitled to recover from the charterers the sums paid to the holders of the bills of lading.

As to the principle for which the owners contended McNair J. said in that case:

'I first observe that this principle has little application in the construction of a special typed or written clause which is added to the printed form. See the judgment of Lord Ellenborough in *Robertson* v. *French*(5). This is quoted by Lord Halsbury in *Glynn* v. *Margetson & Co.** This judgment is to the following effect:

"the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied), are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formality adapted

*(1893) A.C. 351.

equally to their case and that of all the other contracting parties upon similar occasions and subjects."

And where different parts of the instrument are contradictory to each other, or of ambiguous agreement, the whole of the document must be considered to arrive at the general meaning. The principle *noscitur a sociis* (i.e. the meaning of a word can be gathered from the context) may determine the meaning of a clause or part of a clause. Difference in the size of type in which different parts are printed is not to be taken as a measure of the importance of the passages so printed(18).

EVIDENCE PERMISSIBLE

Having dealt with the main rules of construction it will be useful to refer now to the evidence which may be permissible.

Where a contract has been reduced to writing, the general rule is that oral evidence is inadmissible to add to, vary or contradict, the written instrument. There is, however, a presumption that the parties to a mercantile contract entered into it with reference to the customs prevailing in the particular trade or locality to which the contract relates, provided such customs are reasonable, certain and notorious. This presumption can be rebutted only by showing that the parties intended to exclude the custom, and the most effective way of doing this is by showing that the express terms of the contract are inconsistent with the usage which it is sought to incorporate. "Any custom of the port to the contrary notwithstanding" is a good example of such an express term(19).

CUSTOM

Customs of trade may control the mode of performance of a contract, but cannot change its intrinsic character. Thus, if the express terms of the charter are inconsistent with the alleged custom, evidence of the custom will not be admissible.

Evidence of custom is, therefore, admissible to explain ambiguous mercantile expressions in a charter, or to add incidents, or to annex usual terms and conditions which are not inconsistent with the written contract between the parties, but not for any further purpose.

In general, therefore, the term "loading" will be construed by the customs of the port of loading, "discharge" by the customs of the port of discharge, the method of payment of freight, in the absence of express provisions, by the customs of the port where freight is payable; for, where the performance of a contract has reference to a particular trade the party contracting is necessarily obliged to make himself acquainted by due inquiry with the customs of that trade(20).

A steamship was chartered to load a full cargo of coal at Calcutta, at such dock, place or wharf as the charterers should direct. The charter-

(18) Scrutton, 17th ed., p. 17.
(19) Payne, 8th ed., pp. 75-76.
(20) Scrutton, 17th ed., pp. 22, 23.

party provided (inter alia) that the lay days were not to count until the ship was in berth, also that its provisions were subject to Government regulations and restrictions affecting the usual shipment of the cargo. Notice of readiness was given on December 27, but the ship did not obtain a berth until February 13; the loading then began, but was not completed until several days after the expiration of the lay days owing to the absence of cargo. It was a rule of the port that a ship could not have a berth assigned to her until coal was actually ready on the wharf or about to arrive immediately. It appeared from the evidence that the ship had not obtained a berth earlier because no coal was ready; coal had been sent down labelled for the ship, but as the ship was not in a berth it had been diverted to other ships which were being loaded by the charterers' agents, who were also agents for the owner. It was held that the rule of the port under which the obtaining of a berth had been delayed was not a Government regulation or restriction within the exceptions in the charterparty, and that as the delay was due to the act or default of the charterers in not having the coal ready they were liable for damages in respect of the time so lost.*

LORD CAMPBELL C.J'S TEST

The best test whether a custom is, or is not, consistent with the contract is that of Lord Campbell C. J.: "To fall within the exception of repugnancy the (custom) must be such as if expressed in the written contract would make it insensible or inconsistent"(21).

It should be remembered that in the case of a bill of lading evidence of usage is more readily admitted than in the case of a charterparty, since the former may or may not represent the contract between the shipper and the shipowner, while the latter always does so.

PROPER LAW OF CONTRACT

Where parties to a bill of lading or a charterparty are domiciled in different countries the question may arise as to the law which will govern the contract. The law which the English or Indian Court is to apply in determining the obligations under such a contract is known as "the proper law of the contract"(22). It is the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion(23). It depends upon the place with which the contract has the most substantial connection(24), or, at any rate with regard to the question of valid creation, upon the country in which

**Hogarth* v. *Cory Brothers*, (1926) 53 I.A. 230.

(21) *Humfrey* v. *Dale*, (1857) 7 E. & B. 266, 275; *The Turid*, (1922) 1 A.C. 397.

(22) *Mount Albert* v. *Australasian Temperance*, (1938) A.C. 224, 240 (per Lord Wright).

(23) *Bonython* v. *Commonwealth of Australia*, (1951) A.C. 201, 219 (per Lord Simonds); *Re United Railways of Havana*, (1959) 2 W.L.R. 251, 272-3 (per Jenkins L.J.).

(24) *Boissevain* v. *Weil* (1949) 1 K.B. 482, 490 (per Denning L. J.).

the contract is localized. The country in which the elements of the contract are most densely grouped will represent its natural seat(25).

INTENTION OF PARTIES, HOW ASCERTAINED

The law which governs a contract depends upon the intention of the parties, express or implied(26). When the intention is expressed in words, the expressed intention prima facie determines the proper law of the contract, and in general overrides every presumption(27), but, when not so expressed the intention of the parties is to be ascertained on a consideration of the terms of the contract, the situation of the parties, and generally on all surrounding facts(28). Where the bill of lading was in an English form and in the English language incorporating all the terms, conditions and exceptions of the charterparty, the inference was that sensible businessmen must have intended that the bill of lading should be read with the English interpretation attaching to the charterparty(29). The Court will not necessarily regard the choice by parties as being the

(25) Cheshire on Private International Law, 5th ed., p. 207 ; *Delhi Cloth & General Mills* v. *Harnam Singh* A.I.R. 1955 S.C. 590, 597 ; *Lakshinarayan Ramniwas* v. *Lloyd Triestino* A.I.R. 1960 Cal. 155.

(26) *Bank of Travancore* v. *Dhrit Ram* (1941) L.R. 69 I.A.I.

(27) *Mount Albert* v. *Australasian Temperance* (1938) A.C. 224.

(28) *Lloyd* v. *Guibert*, (1865) 1 Q.B. 115 (place where the contract is made) ; *Chartered Mercantile Bank* v. *N.I.S.N.*, (1883) 10 Q.B.D. 521 (English shipper and ship wearing Dutch flag) ; *Jacobs* v. *Credit Lyonnais*, (1884) 12 Q.B.D. 589 (contract made in England by merchant residing there for delivery in London) ; *In re Missouri Steamship Co.*, (1889) 42 Ch.D. 321 (reference to "Queen's enemies" in the bill of lading) ; *The Industrie*, (1894) P. 58 (reference to "Queen's enemies" in the charterparty) ; *Hamlyn* v. *Talisker*, (1894) A.C. 202 (arbitration by two members of the London Corn Exchange); *Royal Exchange Assurance* v. *S. A. Vega*, (1902) 2 K.B. 384 (reference to jurisdiction and decision of the English Law Courts) ; *Spurrier* v. *La Cloche* (1902) A.C. 446 (reference to Arbitration Act, 1899) ; *Kirchner* v. *Gruban*, (1909) 1 Ch. 413 (reference to German Courts and German law) ; *N.V.K.* v. *James Finlay*, (1927) A.C. 604 (arbitration of London brokers) ; *Norske Atlas Insurance* v. *London General Insurance*, (1927) 43 T.L.R. 541 (reference to arbitration in Christiania) ; *The Adriatic* (1931) P. 241 (arbitration in London) ; *The Assunzione*, (1954) 1 All. E.R. 278 (payment in lire in Italy) ; *The Fehmarn*, (1958) 1 All. E.R. 333 (dispute to be judged in the U.S.S.R. according to the Merchant Shipping Code of the U.S.S.R.) ; *Marittima Italiana* v. *Burjor*, (1930) I.L.R. 54 Bom. 278 (reference to judicial authority in Italy) ; *Lloyd Triestino* v. *Lakshinarayan Ramniwas*, A.I.R. 1959 Cal. 669 and A.I.R. 1960 Cal. 155 ; *Lakshinarayan Ramniwas* v. *Genovese*, A.I.R. 1960 Cal. 545 ; *Lakshinarayan Ramniwas* v. *Manesman Export*, A.I.R. 1960 Cal. 733 ; *Lloyd Triestino* v. *B. R. Herman & Mohatta*, unreported, (reference to judicial authority in Italy) ; *Lakshinarayan Ramniwas* v. *N.V.V.N.S.* (1958) 64 C.W.N. 269 (reference to Court at Amsterdam or Rotterdam) ; *B. R. Herman & Mohatta* v. *Swedish E.A. Co.*, unreported (reference to decision in Sweden according to Swedish law).

(29) *The Njegos*, (1936) P. 90. See also *The Metamorphosis*, (1953) 1 All. E.R. 723.

governing consideration where a system of law is chosen which has no real or substantial connection with contract looked on as a whole(30).

"LAW OF THE FLAG"

The "law of the flag" means the law of the country whereof the ship wears the flag and to which the ship is presumed to belong. If from the terms of the contract no inference can be drawn as to the law which the parties intended to apply, the law of the flag is the proper law of the contract(31).

THROUGH CARRIAGE—INTENTION OF PARTIES

Where the contract is to do several things which are separable from one another, there is no inconsistency in supposing that the parties intended it to be governed by one law as to one part and by another law as to another part. Contracts for through carriage are of this kind; and it would be reasonable in some cases to adopt that rule of interpretation. Where, for example, an agreement was made between Americans for the carriage of cotton under a through bill of lading, from a place inland in the United States to England, say by rail to Philadelphia, and thence by a steamer belonging to an English line, it might well be supposed that the law of the flag was meant to govern the contract as to the latter part of the transit, although as to the first part there would be little doubt that American law would determine its effect(32).

EFFECT OF CLAUSE FOR ARBITRATION IN A GIVEN COUNTRY

Tzortis v. *Monark Line A/B*

There is no necessary affinity between a rule as to the place of jurisdiction and a rule for the choice of law. It does not follow that because a Court is competent it must ex-necessitate apply its own law. But a clause in a contract providing for arbitration in a given country is an important indication that the parties must be taken to have intended the contract to be governed by the law of that country. Where there is a conflict of laws and the question is as to what is the proper law applicable, it will be useful to remember the observations of Lord Denning M. R. in the recent case of *Tzortis* v. *Monark Line A/B*.(33).

In that case by a contract of November 7, 1963, made in Stockholm between Swedish sellers and Greek buyers the S.S. Montrose was sold to the buyers for £38,000 in freely transferable pounds sterling. A

(30) *Re Helbert Wagg & Co. Ltd.*, (1956) 1 All. E.R. 129, 136 (per Upjohn J.).
(31) Dicey, *Conflict of Laws*, 7th ed., pp. 822, 823, 824-5; *Moore* v. *Harris*, (1876) 1 App. Cas. 318; *Compagnie* v. *Compagnie*, (1969) 1 W.L.R. 449.
(32) *British Shipping Laws*, Vol. II, para. 591.
(33) (1968) 1 W.L.R. 406, 411-2, C.A. But see *Compagnie Tunisienne* v. *Compagnie D'Armement*, (1969) 1 W.L.R. 449, where the contract expressly provided that the proper law of the contract was to be "the law of the flag", *viz.* French law, and it was held that no inference could be drawn from the inclusion of the provision for arbitration in London.

deposit was to be made with a Stockholm bank and the cash amount was to be paid in sterling transferable to Swedish kroner to the seller's account with the bank. The ship was to be delivered at a Swedish west coast port. The memorandum of agreement of the same date was in the standard form in use in Scandinavia. The arbitration clause stated, inter alia, that any dispute in connection with the contract should be decided by arbitration in the City of London and that in default of agreement on a single arbitrator each party should appoint one arbitrator and a third should be appointed by "the High Court or the corresponding court at the place where the arbitration" was to be held.

A dispute arose; each side appointed an arbitrator; and a third was appointed by the High Court in England. On the question whether the proper law to be applied by the arbitrators was English or Swedish law, Donaldson J. held that, in view of the arbitration clause, the arbitrators were to apply English Law.

On appeal by the buyers, it was held, dismissing the appeal, that, although apart from the arbitration clause the contract had its closest and most real connection with Sweden, the parties by choosing the City of London as the place of arbitration had impliedly chosen English law as the proper law of the contract.

In the course of his judgment Lord Denning M. R. observed:

'The cases on this point start, as Mr. Kerr reminded us, with *Hamlyn & Co.* v. *Talisker Distillery*(34) and *Spurrier* v. *La Cloche*(35). Those cases show that where you have the nationals of two countries providing for an arbitration to take place in the country of one of them, that is a very strong indication that the proper law of the contract is the place of the arbitration.

'But Mr. Kerr suggested that it was different when the place of the arbitration was not the country of one of the two parties of which they were nationals but another country altogether. There are, however, cases against him, notably *N. V. Kwik Hoo Tong Handel Maatschappij* v. *James Finlay & Co. Ltd.*(36) and *Naamlooze Venncootschap Handels-en-Transport Maatschappij "Vulcaan"* v. *A/S Ludwig Mowinckels Rederi*(37). And I see no reason for any such difference. When Swedish sellers and Greek buyers agree on arbitration in London, it may fairly be presumed that they mean that English law is to be applied. In the *Kwik Hoo Tong case*(38), Lord Phillimore said(39): "The forum provided for the settlement of disputes is English, and therefore the contract is intended to be governed by English law". And in *Vita Food Products, Inc.* v. *Unus Shipping Co. Ltd.*(40) Lord Wright

(34) (1894) A.C. 202; 10 T.L.R. 479, H.L. (S.C.).
(35) (1902) A.C. 446; 18 T.L.R. 606 P.C.
(36) (1927) A.C. 604, H.L. (E).
(37) (1938) 60 Ll.L. Rep. 217; (1938) 2 All E.R. 152, H.L. (E).
(38) (1927) A.C. 604.
(39) *Ibid.* 609, 610.
(40) (1939) A.C. 277; 55 T.L.R. 402; (1939) 1 All E.R. 513, P.C.

said(41): "The provision in a contract (*e.g.* of sale) for English arbitration imports English law as the law governing the transaction."

'If one leaves the cases and turns to the text books, Dicey and Morris, *Conflict of Laws,* 8th ed. p. 1047, says that "as a rule, the parties, by fixing the place of arbitration, implicitly choose the proper law of their contract in general and that of the arbitration clause in particular". Professor Cheshire, *Private International Law*, 7th ed. p. 193 says that an arbitration clause

"may merely refer possible disputes to the tribunals of the chosen country or may go further and add that the tribunal shall apply the law of its own country". Then he says: "This addition, though convenient as a clear indication of the proper law, is not of vital significance, since for better or for worse English law is committed to the view that *qui elegit judicem elegit jus.* An express choice of a tribunal is an implied choice of the proper law".

'Both on the cases and the text books, I am satisfied in this case that, by choosing the City of London as the place of arbitration, the parties have impliedly chosen English law as the proper law of the contract'.

Dhanrajamal v. *Shamji*

In a recent case(42) before the Supreme Court of India Hidayatullah J. (as he then was) held that whether the proper law is the lex loci contractus or lex loci solutionis, in the absence of any expressed intention, is a matter of presumption. If Courts of a particular country are chosen, it is expected, unless there be either expressed intention or evidence, that they would apply their own law to the case. Where the arbitration clause indicated an arbitration in India, this leads to an inference that the parties have adopted the law of the country in which arbitration is to be made. This inference can be drawn even in a case where the arbitration clause is void according to the law of the country where the contract is made and to be performed.

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(41) (1939) A.C. 277, 290.
(42) *Dhanrajamal* v. *Shamji,* A.I.R. 1961 S.C. 1285.

LECTURE IV

THE CONTRACT OF CARRIAGE

In this lecture we shall deal with frustration and the effect of illegality on the contract of carriage.

UNENFORCEABLE CONTRACTS

We shall take up the effect of illegality first. Now, a contract which is expressly or impliedly prohibited by statute is unenforceable, irrespective of the intention of the parties. Similarly, where the contract cannot be performed without a violation of the municipal law, as it stands at the date the contract is made, it is unenforceable whether the parties knew of the illegality or not when it was entered into. If it becomes illegal by a subsequent change of the law, the contract is not void but its obligations are discharged by impossibility of performance. If, however, prevention of performance by illegality is due to a party's own act, illegality will be no defence to the injured party's claim(1).

EFFECT OF INDIAN MERCHANT SHIPPING ACT XLIV OF 1958

The consolidating English Merchant Shipping Act of 1894 and certain other Acts of English merchant shipping legislation, including the Merchant Shipping (Safety and Load Line Conventions) Act of 1932, have ceased to have any force or effect in India since the enactment of the Indian Merchant Shipping Act XLIV of 1958. Now, Section 323(7) of the Indian Act of 1958 enacts that for the purposes of that section a ship shall be deemed to be loaded beyond the limits allowed by the certificate if she is so loaded as to submerge in salt water, the ship has no list, the appropriate load line on each side of the ship, that is to say, the load line appearing by the certificate to indicate the maximum depth to which the ship is for the time being entitled under the Load Line Convention to be loaded.

Now, the language of this sub-section is substantially the same as that of Section 44 of the English Merchant Shipping (Safety and Load Line Conventions) Act, 1932, and by Section 57 of that English Act the provisions of Section 44 apply to load line ships not registered in the United Kingdom while they are within any port in the United Kingdom. But a shipowner's infringement of the provisions of Sections 44 and 57 of the Act of 1932 will not prevent him from suing on the contract of affreightment.

St. John Shipping Corporation v. *Joseph Rank Ltd.*

Thus, a ship, registered in Panama, carrying grain from a United States port to a port in the United Kingdom under a charterparty made

(1) Scrutton, 17th ed., p. 11.

between the shipowners and English charterers put into a port in Florida and took on bunkers, overloading the ship and causing its load line to be submerged. The load line was still submerged when the ship arrived at its destination and the master was prosecuted for an offence under Sections 44 and 57 of the Act of 1932, convicted and fined £1,200. The defendants, holders of a bill of lading in respect of part of the cargo, paid most of the freight due, but they (together with another cargo-owner) withheld a sum equivalent to the freight on overall additional cargo carried by the ship by which it was found to be overloaded. They contended, when sued for the balance of the freight, that the shipowners were not entitled to recover any part of it as they had performed the charter in an illegal manner. Devlin J. held—

"(*1*) that the infringement of a statute in the performance of a contract which was legal when made did not render the contract illegal unless the contract, as performed, was one which the statute meant to prohibit, and that, on a true construction of the Act of 1932, having regard to its scope and purpose, contracts for the carriage of goods were not within the ambit of the statute at all so that the plaintiffs' infringement of Sections 44 and 57 did not prevent them from suing on the contract;

(*2*) that in order to succeed in their claim for freight the plaintiffs need do no more than show that they had delivered the goods to the defendants in the same good order and condition in which they had received them, and it was not necessary for them to disclose that they had committed an illegality in the course of the voyage; and

(*3*) that the principle that a right was unenforceable if it directly resulted from the crime of the person asserting it did not apply in the present case, for the plaintiffs' right to freight from the defendants was not a right which was brought into existence by their crime, which affected the total amount of freight earned by the ship, and no claim or part of a claim for freight could be clearly identified as being for the excess illegally earned; accordingly the plaintiffs' claim succeeded."

This decision should hold good in the case of an infringement of Section 323(7) of the Indian Act of 1958.

In that case his Lordship (Devlin J.) observed :

"There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it. This principle is not involved here. Whether or not the overloading was deliberate when it was done, there is no proof that it was contemplated when the contract of carriage was made. The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the

two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits; but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable"(2).

LORD WRIGHT'S TEST OF VOID CONTRACTS

A contract of carriage of goods is not to be considered void merely because the ship in which they are carried does not comply with the law. Each case must be determined by reference to the relevant statute and the exclusion must be reached on "the true construction of the statute, having regard to its scope and its purpose and to the inconvenience which would follow from any other conclusion"(3).

The fact that it may be known to one of the parties at the time of making the contract that he cannot perform it legally, and therefore that it will inevitably be broken, does not make the contract itself illegal(4).

Monarch Steamship Co. v. *Karlshamns*

A British vessel was chartered in April, 1939, by a British company and in May bills of lading signed on behalf of the owners were issued to the charterers in respect of a cargo of 8,200 tons of soya beans shipped in Manchuria in accordance with the terms of the charterparty setting out a range of North Sea and Baltic ports. In June Karlshamn in Sweden was nominated by the charterers as the sole port of discharge but, owing to delay caused by the vessel's unseaworthiness, she did not reach that port before the outbreak of war between Great Britain and Germany in September, when the British Admiralty prohibited her from proceeding thither and ordered the cargo to be discharged at Glasgow which she reached on October 21. A Swedish company, who in April had purchased from the charterers 8,200 tons of soya beans to be shipped on board the vessel, became indorsees of the bills of lading on October 23; they required the beans for manufacture and for replacement of beans borrowed from a Swedish Government pool and incurred expense in forwarding them, in neutral ships chartered for the purpose to Karlshamn where no soya beans were then obtainable. A war risks clause in the charterparty exonerated the owners of the vessel in the event of compliance with any orders given by the government of the nation under whose flag she sailed, as to destination, delivery or otherwise. It was held, that the effective cause which brought the

(2) *St. John Shipping Corporation* v. *Joseph Rank Ltd.*, (1957) 1 Q.B. 267, 283.
(3) *Vita Food Products Inc.* v. *Unus Shipping Co.*, (1939) A.C. 277, 295 P.C. (per Lord Wright).
(4) *Archbolds* v. *Spanglett*, (1961) 1 Q.B. 374 C.A.

Admiralty orders into operation was the delay in the voyage caused by the vessel's unseaworthiness and thus the delay in carrying out the contract of carriage was attributable to the owners' default, because, in view of the international situation, they should have foreseen that war might break out and cause loss or diversion of the vessel(5). The illegality was due to the appellants' own act and was not available as a defence to the injured party's claim.

The doctrine of frustration of contracts is usually connected with charterparties and the carriage of goods by sea. The frustrating event is something altogether outside the control of the parties—a war, a famine, a flood or some event of that sort—so that if the parties had thought to provide for it they would at once have agreed that on its happening the contract must come to an end(6).

ORIGIN OF DOCTRINE OF FRUSTRATION

The doctrine of frustration has been the result of fusion of two older principles :

(*i*) that a contract is discharged by the destruction of its subject-matter ; and

(*ii*) that a maritime adventure is regarded as de facto prevented if its commercial object is frustrated(7).

The doctrine first appeared in cases in which it was decided that where a ship was chartered to proceed to a named port and there load, and circumstances afterwards arose without any default of parties which prevented the ship reaching that port within a reasonable time, as contemplated by the parties, the parties were released from the charterparty(8).

Horlock v. *Beal*

In *Horlock* v. *Beal*(9) British seamen signed articles for a voyage on a British ship. During that voyage, when the ship was at a German port, war was declared with Germany, the ship was detained and the crew were imprisoned. The House of Lords held that the seamen ceased to be entitled to their wages when the further performance of the contract became impossible, viz. when the ship was detained.

It was in the last-mentioned case, and in subsequent decisions arising from the 1914-1918 war, that the House of Lords established the doctrine of frustration on its modern footing(10).

The Courts introduced the doctrine by presuming that the parties must

(5) *Monarch Steamship Co.* v. *Karlshamns*, (1949) A.C. 196.
(6) *Denmark Productions* v. *Boscobel Productions*, (1968) 3 W.L.R. 841, 862 (per Harman L. J.).
(7) *British Shipping Laws*, Vol. II, para. 436.
(8) *Ibid*, para. 438.
(9) (1916) 1 A.C. 486.
(10) *British Shipping Laws*, Vol. II, paras. 440, 442.

have intended to incorporate these conceptions in their contracts; it depended on an implied term(10).

During and immediately after the war of 1914-18 this doctrine was frequently in question in regard to the effect upon a charter of a requisition of the ship by the British Government. In the first case in which that question came before the highest tribunal there was a great conflict of judicial opinion. The case was decided in favour of the charterer, (who contended that the charter was still in force) by three judges (Lord Buckmaster L.C., Lord Loreburn and Lord Parker) against two (Lord Haldane and Lord Atkinson)(11).

PRINCIPLE DEDUCED FROM *Tamplin* v. *Anglo-Mexican Co.*

The principle deduced from that case(11) and subsequently applied by other courts in subsequent cases, is really that laid down by Lord Loreburn alone, viz., that if the requisition was likely to outlast the whole remaining period of the charterparty the contract would be dissolved, but if the requisition was likely to last for a period substantially less than the remaining period of charter, it would not be dissolved. In the subsequent cases, in accordance with this, the evidence of shipbrokers was adduced and admitted to prove how long, from their experience, the parties as reasonable business men ought, at the date of the requisition, to have expected that it would last.

Frustration is really a particular application of the more general principle that a contract which by supervening and unforeseen circumstances, arising without default on the part of either party, becomes impossible of performance may cease to bind either party to it. If the frustrating event is proved, the onus of proving that it arose through the default of either party rests upon the party alleging such default. The contract of affreightment may be brought to an end by the supervening event, whether it is still executory, or has been in part already performed.

CAUSES OF FRUSTRATION

Frustration may arise from—

(*1*) impossibility of performance; or

(*2*) delay; or

(*3*) subsequent change of law.

The recent blockade of the Suez Canal following in the wake of the nationalisation of the Canal by President Nasser of Egypt gave rise to a crop of cases involving impossibility of performance of contract. Some of these cases will be noticed here.

(11) *Tamplin* v. *Anglo-Mexican Co.*, (1916) 2 A.C. 397.

IMPOSSIBILITY OF PERFORMANCE

Carapanayoti v. *Green*

In *Carapanayoti* v. *Green*(12) by a written contract dated September 6, 1956, sellers agreed to sell to buyers cottonseed cake for shipment from Port Sudan during October/November at sellers' option, c.i.f. Belfast. At the date of the contract the usual and customary route for the shipment of goods from Port Sudan to Belfast was via the Suez Canal. On November 2, the Suez Canal was closed to navigation. The sellers did not ship the contract goods. It was held (*1*) that where a contract expressly, or by necessary implication, provides that performance, or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for;

(*2*) that the sellers' obligation under this contract was not confined to shipping by a route which was usual and customary at the date of the contract, but was to ship by a route usual and customary at the time of performance; and

(*3*) that the continued availability of the Suez route was a fundamental assumption at the time when the contract was made, and to impose on the sellers the obligation to ship by an emergency route via the Cape would be to impose on them a fundamentally different obligation, and, accordingly, the contract was frustrated.

Tsakiroglou v. *Noblee*

This decision was overruled by the decision in *Tsakiroglou* v. *Noblee*(13), where by a written contract dated October 4, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Hamburg during November/December, 1956. On November 2 the Suez Canal was closed to navigation, but the goods could have been shipped round the Cape of Good Hope. The alternative route round the Cape of Good Hope was more than twice as long, and freightage by this route far more costly. The sellers failed to ship the goods, and in arbitration proceedings the umpire held that the sellers were in default and the appeal board upheld the umpire's award.

The appeal board found that "the performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal". It was held—

(*1*) that a term that shipment should be (*a*) via Suez, or (*b*) by the usual and customary route at the date of the contract, should not be implied into the contract;

(*2*) that since the Suez Canal was unusable during the relevant period the sellers' duty was to ship the goods to the required port by a reasonable and practicable route if available, and

(12) (1959) 1 Q.B. 131.
(13) (1962) A.C. 93.

(*3*) that, although the route via the Cape involved a change in the method of performance of the contract, it was not such a fundamental change from that undertaken under the contract as to entitle the sellers to say that the contract was frustrated.

In that case Viscount Simonds observed : "I have not thought it necessary to deal with Pearson J.'s decision in *Societe Franco Tunisienne D'Armement* v. *Sidermar S.P.A.*(15). There the question was whether a charterparty was frustrated by the blocking of the Suez Canal. The learned judge held that it was, but was at pains to point out that the position was very different in a contract for the sale of goods. Upon that point I agree with him and need not discuss the matter further"(14).

Societe F.T. D'Armement v. *Sidermar S.P.A.*

Now, in *Societe Franco Tunisienne D'Armement* v. *Sidermar S.P.A.*(15) by a charterparty dated October 18, 1956, shipowners chartered their vessel to charterers for the carriage of iron ore from Masulipatan, on the east coast of India, to Genoa. The terms of the charterparty were, inter alia, that the vessel should proceed with all convenient speed to Masulipatan and there load. The captain was to wireless the shippers at Madras giving four days' preliminary notice and also 48 hours' definite notice of his expected time of arrival at the loading port. The captain was also to telegraph to "Maritsider Genoa" on passing the Suez Canal. On July 26, 1956, President Nasser had announced the nationalisation by Egypt of the canal. Thereupon, the canal became the subject of an international crisis and when the charterparty was concluded there was a possibility that the crisis could result in a resort to force, in which event the canal might become closed to shipping. At the time of the charterparty the route via the Suez Canal was the shortest and customary route from Masulipatan to Genoa. If the canal was closed the shortest route was via the Cape of Good Hope. When they entered into the charterparty both shipowners and charterers appreciated these facts. From October 28, 1956, until the general cease fire, there was heavy fighting in the Sinai Peninsula between Egyptian and Israeli forces. On October 31, 1956, the air forces of Britain and France attacked various targets in Egypt. On November 5 and 6 British and French troops landed in the areas of Port Fuad and Port Said. By November 4 at least eight ships had been sunk in the Suez Canal, blocking it to shipping. By November 9, when the vessel arrived at Masulipatan, both parties appreciated that it was likely that the canal would remain blocked for a period of time which would, if the vessel were to await the re-opening of the canal, be so long as to put an end to the commercial purpose of the venture. Nevertheless notice of readiness to load was given immediately the vessel arrived at Masulipatan. The charterers tendered a cargo of iron ore which was loaded with the captain's permission between

(14) (1962) A.C. 93, 116.
(15) (1961) 2 Q.B. 278.

November 13 and 18. A bill of lading dated November 18 was issued by the shipowners in respect of this cargo. The vessel sailed for Genoa on November 19. On November 20, the shipowners informed the charterers that the blocking of the canal had brought the charterparty to an end and they claimed freight at the rate of 209s. per long ton of the cargo. The charterers maintained that the shipowners remained bound by the charterparty, and that they could not claim freight at a rate higher than that provided by the charterparty, namely, 134s. per long ton. It was agreed by the parties that the dispute should be referred to arbitration in London, and that pending the result of the arbitration the charterers should pay freight at the charterparty rate. The vessel sailed round the Cape of Good Hope and arrived at Genoa on February 16, 1957, having off-loaded 238-563 long tons of ore at Ceuta into the s.s. Condesa in order to comply with the International Load-Line Convention. The two vessels delivered a total of 4,904-635 long tons of ore at Genoa on which the charterers paid freight at the rate of 134s. per long ton.

The distance between Masulipatan and Genoa via the Cape was about twice the distance via the canal. The extra distance round the Cape rendered the voyage financially more onerous to the shipowners and exposed the vessel to maritime hazards for a longer period ; but the vessel was capable of withstanding such hazards. The cargo was not exposed to any risk of damage or deterioration, and there was no evidence that another voyage had been fixed for the vessel on arrival at Genoa or that any trading schedule had been dislocated by the voyage roumd the Cape. If the vessel had been able to sail via the Suez Canal she would not have arrived before December 16, 1956, and therefore she would not have been able to load any more cargo at Masulipatan if she was to arrive in Genoa in December laden no deeper than her winter marks. A reasonable remuneration for the carriage from Masulipatan to Genoa via the Cape of the cargo loaded in the vessel was 195s. per long ton. It was held—

(*1*) that the charterparty was frustrated by the blocking of the Suez Canal because, having regard to the express provisions of the contract and the surrounding circumstances, it was a term of the contract (whether express or implied) that the vessel was to go by the Suez Canal route and the route via the Cape was so circuitous, unnatural and different in a number of respects that it was to be regarded as a fundamentally different voyage. The position was not analogous to the case of a c.i.f. contract for the sale of goods ; and

(*2*) that the shipowners were entitled to be paid a reasonable freight at the rate of 195s. per long ton on a quantum meruit.

Glidden Co. v. *Hellenic Lines Ltd.*

In that case(15) Pearson J. remarked in the course of his judgement : "There was also cited an American case, *Glidden Co.* v. *Hellenic Lines*

*Ltd.**, which was decided by the United States Court of Appeals, Second Circuit. There were charterparties for the transportation of ilmenite from India to 'a United States Atlantic Port north of Cape Hatteras.' The voyage was to be 'via Suez Canal or Cape of Good Hope, or Panama Canal, at owners' option declarable not later than on signing of bills of lading, to one safe U.S. Atlantic Port north of Cape Hatteras, port at charterer's option.' There was a typewritten insertion that the charterer's option was 'to be declared not later than on vessel's passing Gibraltar.' It was argued that provision which had been inserted in typescript necessarily implied that the vessel must pass Gibraltar, and, therefore, must go through the Suez Canal and could not go by any other route. But the answer to that, in the construction of that particular contract, obviously, was that if one accepted that implication then it would mean that no meaning whatever was being given to the alternative expressly provided for via the Cape of Good Hope or Panama Canal. It was held that it could not be accepted that, upon the true construction of that contract, the voyage must necessarily be performed through the Suez Canal. It was held, therefore, that, when the Suez Canal was closed, that did not cause a frustration. In my view, that is merely an example of a particular charterparty being construed according to its terms, and the terms were different from those in the present case."

The Eugenia

In the later case of *The Eugenia*(16) Lord Denning M.R. differed from Pearson J., the facts being as follows. By a time charterparty of September 9, 1956, the Eugenia was let to the charterers for a "trip out to India via Black Sea" from the time the vessel was delivered to the charterers at Genoa. The charterparty by clause 21, a customary war clause, provided : "The vessel, unless the consent of the owners be first obtained, not to be ordered nor continue to any place or on any voyage nor be used on any service which will bring her within a zone which is dangerous as the result of any actual or threatened act of war, war hostilities, warlike operations. . . ." When the charterparty was negotiated the agents of both parties realised that the Suez Canal might be closed, but no express terms were inserted in the charter to meet that eventuality. The vessel was delivered on September 20 at Genoa. On October 25, 1956, she sailed from Odessa, the customary route at this time to India being still by the Suez Canal. She arrived at Port Said on October 30, when Egyptian anti-aircraft guns were in action. Port Said and the Suez Canal were then zones which were "dangerous" within clause 21. The vessel entered the canal on October 31 and proceeded south. The canal was blocked by the Egyptian Government, and the vessel was trapped. A passage was cleared northward in January

*275 F. 2d. 253.

(16) (1964) 2 W.L.R. 114 C.A.

1957, and on January 12, 1957, the vessel arrived at Alexandria. On January 4 the charterers claimed that the charterparty had been frustrated by the blocking of the canal. The owners denied frustration. They treated the charterers' conduct as repudiation and claimed damages. It was held,

(*1*) that this was a time charter the essence of which was that the shipowners place the vessel at the disposal of the charterers. The vessel was under the charterers' orders when she approached the Suez Canal and the charterers were in breach of the war clause when they ordered her to enter the canal; and

(*2*) that the blocking of the Suez Canal did not bring about so fundamentally different a situation as to frustrate the venture.

An observation made by Lord Denning M.R. in that case(16) deserves notice : "The theory of an implied term has now been discarded by everyone, or nearly everyone, for the simple reason that it does not represent the truth. The parties would not have said : 'It is all over between us.' They would have differed about what was to happen. Each would have sought to insert reservations or qualifications of one kind or another. Take this very case. The parties realised that the canal might become impassable. They tried to agree on a clause to provide for the contingency. But they failed to agree. So there is no room for an implied term." His Lordship observed further :

"It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. But it is not so. The only thing that is essential is that the parties should have made no provision for it in their contract. The only relevance of it being 'unforeseen' is this : If the parties did not foresee anything of the kind happening, you can readily infer they have made no provision for it; whereas, if they did foresee it, you would expect them to make provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the republican government. The purpose was to evacuate refugees. The parties foresaw that she might be seized by the nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated, see *W. J. Tatem Ltd.* v. *Gamboa**. So here the parties foresaw that the canal might become impassable : it was the very thing they feared. But they made no provision for it. So there is room for the doctrine to apply if it be a proper case for it."

And his Lordship went on to say : "We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract,' see *Davis Contractors Ltd.* v. *Fareham Urban District Council***

*(1939) 1 K.B. 132.
**(1956) A.C. 696, 729.

by Lord Radcliffe. To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done. And it is for the courts to do it as a matter of law : see *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl G.m.b.H.*(13) by Lord Simonds and by Lord Reid.

"Applying these principles to this case, I have come to the conclusion that the blockage of the canal did not bring about a 'fundamentally different situation' such as to frustrate the venture. My reasons are these : (*1*) The venture was the whole trip from delivery at Genoa, out to the Black Sea, there load cargo, thence to India, unload cargo, and redelivery. The time for this vessel from Odessa to Vizagapatam via the Suez Canal would be 26 days, and via the Cape, 56 days. But that is not the right comparison. You have to take the whole venture from delivery at Genoa to redelivery at Madras. We were told that the time for the whole venture via the Suez Canal would be 108 days and via the Cape 138 days. The difference over the whole voyage is not so radical as to produce a frustration. (*2*) The cargo was iron and steel goods which would not be adversely affected by the longer voyage, and there was no special reason for early arrival. The vessel and crew were at all times fit and sufficient to proceed via the Cape. (*3*) The cargo was loaded on board at the time of the blockage of the canal. If the contract was frustrated, it would mean, I suppose, that the ship could throw up the charter and unload the cargo wherever she was, without any breach of contract. (*4*) The voyage round the Cape made no great difference except that it took a good deal longer and was more expensive for the charterers than a voyage through the canal.

"The only hesitation I have had about this case is because of the views expressed by Pearson J. in *The Massalia*(15). That case can be distinguished because there was a sentence in the charter which read 'Captain also to telegraph to 'Maritsider Genoa' on passing Suez Canal.' Pearson J. held that that meant there was actually an obligation to pass the Suez Canal, and hence the contract was frustrated by impossibility. I think he attached too much significance to the clause. I think that there, as here, there was no obligation to go through the Suez Canal, but only to go by the route which was customary at the time of performance ; and that there is no legitimate distinction to be drawn between that case and this. That was a voyage charter and this a time charter. That makes no difference except that the burden fell on the owners and not

the charterers. Pearson J. held that the route via the Cape was fundamentally different from the route via the Suez Canal and that the charter was frustrated on that ground also. I am afraid I cannot take that view. It is important to notice also that since that case the House of Lords have held that, with goods sold c.i.f. Sudan to Hamburg, the contract of sale was not frustrated by the closure of the Suez Canal, see *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl G.m.b.H.*(13). I know that a contract of affreightment is different from a contract for the sale of goods, but I should find it strange if, in the case of a ship loaded with cargo, the contract of affreightment was frustrated by the closure of the canal and the contract of sale was not frustrated. It would lead to endless complications."

The doctrine of frustration of an adventure does not apply where performance becomes impossible by reason of the default of one of the parties to the contract. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated(17).

Maritime N. Fish v. *Ocean Trawlers*

Thus, in *Maritime National Fish* v. *Ocean Trawlers*(18) a trawler was chartered for the purpose of trawling with certain gear. That gear could not be used without a licence. A licence was refused because the charterers were only permitted to obtain licences for three trawlers, and had already obtained three licences. The Privy Council held that the adventure was frustrated by the charterers' own default, and that they could not rely on their own default to excuse them from liability under the contract.

The burden of proving that the supervening event was self-induced is on the party alleging that it was.

Joseph Constantine v. *Imperial Smelting*

In *Joseph Constantine S.S. Line Ltd.* v. *Imperial Smelting Corporation Ltd.*(19) there was an explosion in a ship under voyage charter on the way to her loading port. The explosion prevented the performance of the charter and the charterers brought an action against the shipowners for breach of contract. The cause of the explosion was unexplained, but the shipowners established that it had frustrated the commercial object of the adventure. The House of Lords held that they were not bound to prove further that the explosion was not due to their fault.

It is to be remembered that an "anticipatory breach" gives a right to rescind only where (*1*) the party in default renunciates his liabilities under the contract or (*2*) the contract has become impossible of performance in the sense that its commercial object has been frustrated(20).

(17) *Bank Line* v. *Capel*, (1919) A.C. 435, 452 (per Lord Sumner).
(18) (1935) A.C. 524.
(19) (1942) A.C. 154.
(20) *Universal Cargo Carriers* v. *Citati*, (1957) 2 Q.B. 401.

(2) DELAY

Admiral Shipping Co. v. *Weidner, Hopkins & Co.*

Now, delay will frustrate a contract only if it is so long as to destroy the identity of the contract service, when resumed, with the service uninterrupted. As Bailhache J. put it in *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.*(21) :

"The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract, of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made."

In that case(21) a ship was hired under a time charterparty for "two Baltic rounds". She was not allowed to leave a Russian port on account of the outbreak of war between Germany and Russia. The charter contained an exception of "restraints of princes". It was held that the delay was such as completely to frustrate the adventure and the charterers were not liable for hire.

Anglo-N. T. Co. v. *Emlyn Jones*

In another case, *Anglo-Northern Trading Co.* v. *Emlyn Jones*(22), Bailhache J. held that the interruption must be such as to destroy the whole basis of the contract and that the test would be the estimate which a reasonable man of business would make of the probable period during which the vessel's services would be lost to the charterer, and it will be immaterial whether his anticipation is justified or falsified by the event.

This probably explains why the charterparty was not held to be frustrated in the following cases.

Port Line v. *Ben Line Steamers*

In *Port Line* v. *Ben Line Steamers*(23) a vessel was chartered in November 1954 for 30 months. In August 1956 she was requisitioned in view of the Suez Canal crisis, the period of requisition being estimated to be 3 or 4 months. She was released in late November 1956. It was held that the charterparty was not frustrated.

Hongkong F.S. Co. v. *Kawasaki K. Kaisha*

And in *Hongkong Fir Shipping Co.* v. *Kawasaki Kisen Kaisha*(24) a

(21) (1916) 1 K.B. 429, 436 ; approved in the Court of Appeal, (1917) 1 K.B. 222.
(22) (1917) 2 K.B. 78.
(23) (1958) 2 Q.B. 146.
(24) (1962) 2 Q.B. 26 C.A.

vessel was chartered for 24 months from February 1957. Her engines kept breaking down and in June 1957 major repairs had to be effected. These were estimated to take until September, and she was redelivered to the charterers in that month. It was held that the charterparty was not frustrated.

The burden of proving that a sufficiently serious interruption has occurred to put an end to the contract is, of course, on the party who asserts it(25). Where it appears that a voyage charter will be delayed by the outbreak of war for the duration of the war it may be presumed to be frustrated. But a charterparty will not usually be frustrated by delay due to a strike, since strikes have been treated by the courts as subject to such unexpected termination that they cannot without more be treated as abrogating contracts(25).

Baxter, Fell v. *Galbraith*

The doctrine of frustration applies to a contract of carriage evidenced by a bill of lading in the same way as to any other contract. Thus Atkinson J. held in *Baxter, Fell* v. *Galbraith** that bills of lading relating to cargo on a German ship were discharged by the outbreak of war with Germany. In practice, however, practically all the decided shipping cases on frustration have been in reference to charterparties or similar contracts(26).

DOCTRINE OF FRUSTRATION APPLICABLE TO C.I.F. CONTRACTS

And the doctrine will likewise apply to frustrate a c.i.f. contract for the sale of goods if shipment according to its terms becomes commercially impossible(13).

(3) SUBSEQUENT CHANGE OF LAW

A supervening change in the law rendering the contract illegal either by English law or by the law of the country in which performance was to have taken place releases both parties independently of its terms or of the presumed intention of the parties to it(19).

EFFECT OF FRUSTRATION

At common law, when frustration occurred, the contract automatically came to an end, and each of the parties was thereafter released from any further liability to perform his part of the bargain; further, if either party had, in pursuance of the contract, made a payment to the other in respect of a consideration which had wholly failed, the money so paid could be recovered as money had and received. But freight paid in advance was not returnable if frustration supervened. The common law was radically altered in England in the case of contracts to which the

(25) *Metropolitan Water Board* v. *Dick Kerr & Co.*, (1917) 2 K.B. 1.
(26) *British Shipping Laws*, Vol. II, para. 462.
*(1941) 70 Ll.L.R. 142.

Law Reform (Frustrated Contracts) Act of 1943 applies. That Act does not, however, apply to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea. The position, therefore, is that in England in the case of bills of lading and voyage charters the rights and liabilities of the parties will be determined solely in the light of the aforesaid common law principles, while in the case of time charters and charters by demise the provisions of the Act will apply.

LECTURE V

PERFORMANCE OF CONTRACT

The topic of the performance of the contract of carriage involves consideration mainly of—

(*1*) the loading,
(*2*) the voyage, and
(*3*) the unloading of the ship.

SHIP TO PROCEED WITH DILIGENCE TO LOADING PORT

Now, if the ship is not at the port at which she is to load under the charterparty, it is the duty of the shipowner, subject to express qualifications, to take her there with reasonable diligence. There ought to be no unreasonable delay in setting sail, and no needless deviation or dilatoriness on the way. A stipulation fixing the time before which the ship is to sail for the port of loading or by which she is to arrive there must be strictly conformed to, and upon failure the shipowner will be liable in damages to the charterer, who will generally be at liberty to decline to load her. But a stipulation that the ship should "proceed immediately" to the loading port, or a term that she was expected ready to load at a fixed time negatives an intention to make time the essence of the contract. And if the ship is expressly to arrive, or to be ready to load at the port of loading, by an appointed date the performance of that undertaking is a condition precedent to the charterer's obligation to load her. If no time is fixed for sailing to, or arriving at, the loading port, the shipowner is still bound to use all reasonable diligence in dispatching her and bringing her there. If he fails in this he is liable to the charterer. And the fact that a date is named in the charterparty before which the ship must arrive, if the charterer is to be bound to load, does not entitle the owner to delay sending her until that date. Similarly, the charterer is under an obligation to perform his undertakings under a voyage charterparty in a reasonable time if the time allowed for performing them is not expressed in the charter. If the loading port is not named in the charterparty, but remains to be determined by the charterer, he must, subject to special agreement, name it before he can require the ship to sail(1).

"OR SO NEAR THERETO AS SHE CAN SAFELY GET"

The ship is generally to proceed to the loading port, "or so near thereto as she can safely get". This means that the ship's undertaking may be satisfied although she has not come within, or even near, the

(1) *British Shipping Laws*, Vol. III, paras. 607, 614, 615.

port, if she is prevented from doing so by an obstruction of a "permanent" character—physical or political—or one which will delay her for an unreasonable time. In each case the question is whether the impediment could be overcome by the shipowner by any reasonable means except within such a time as, having regard to the objects of the adventure of both charterer and shipowner, was, as a matter of business, wholly unreasonable(2). In the case of a charter for consecutive voyages the obligation to proceed to the first port of loading with reasonable dispatch applies to each of the voyages(3).

CANCELLING CLAUSE

A cancelling clause may exist in the charterparty, in which case the charterer has the option, under the terms of his contract, of repudiating, in certain stipulated circumstances.

EXCEPTION CLAUSES

The exception clauses in a charterparty may apply to the preliminary voyage to the port of loading.

Hence, if a chartered ship is prevented from, or delayed in, getting to the loading port by a peril excepted "during the voyage", the exception applies. This, however, is the case only when the preliminary voyage is clearly incidental to, and, therefore, is considered as part of, the charter voyage. If the ship is disabled by excepted perils while completing a voyage on which she was engaged at the time of chartering, the shipowner will not be excused. The excepted perils only operate to relieve the ship from liability : they do not enable the shipowner to plead that he has performed an obligation which he has not performed(4).

SHIPOWNER'S DUTIES BEFORE LOADING

It is the shipowner's duty to send the ship to the agreed, or, in the absence of special agreement, to the usual, place of loading. He must then give notice to the charterer that the ship is ready to load. Such notice may be given on a Saturday which is to be considered a working day under charterparty. If he fails to do so, and delay in commencing to load is thereby caused, the charterer will not be responsible, as he is not bound to look out for the ship. If the place named for loading be simply a port or dock, notice may be given as soon as the ship arrives in the port or dock although she is not in the particular spot where the loading is to take place ; but this cannot be done when the place is more particularly indicated(5).

(2) *Nelson* v. *Dahl*, (1879) 12 Ch. D. 568, 593 (per Brett L.J.). See also *Athamas* v. *Dig Vijoy Cement Co. Ltd.*, (1963) 1 Lloyd's Rep. 287 C.A.
(3) *Anglo-Saxon Petroleum Co.* v. *Adamastos Shipping Co.*, (1957) 2 Q.B. 235.
(4) Payne, 8th ed. pp. 82-83.
(5) *Ibid.* p. 84.

Thus, the three conditions which must be fulfilled are as follows :—

(*1*) the ship must be at the place where she is bound to be ready for cargo, or "so near thereto as she can safely get";

(*2*) the ship must ready to load; and

(*3*) the charterer must have notice of the above facts.

"ARRIVED SHIP"

When these conditions are fulfilled the vessel is an "arrived ship", and the "lay-days" usually begin, and the charterer will be ordinarily bound to load the cargo.

One must distinguish between—

(*a*) the place at which the ship becomes an "arrived ship" under the charter, and

(*b*) the place at which the charterer is bound to load her.

They may coincide, or the first may precede the second : in every case it depends upon the terms of the charter.

Nelson v. *Dahl*; *Tharsis v. Morel*; *Leonis Co.* v. *Rank*; *The Aello*

The leading cases on this point are *Nelson* v. *Dahl*(6), *Tharsis* v. *Morel*(7), *Leonis Co.* v. *Rank*(8) and *The Aello*(9), and the principles involved appear to be now settled in the last-mentioned case. In that case(9) by a charterparty dated August 27, 1954, the steamship AELLO was chartered to proceed as ordered by charterers to receive from them a cargo of wheat and/or maize and/or rye "at one or two safe loading ports or places in the River Parana . . . . and the balance of the cargo in the port of Buenos Aires." The charterers had contracted with a Swiss firm to buy maize f.o.b. Argentine ports at sellers' option in accordance with an allocation received from a body called the Grain Board, and the Swiss firm in turn contracted to buy the maize from an Argentine state concern which controlled the sale and export of maize.

At the date of the charterparty the system of traffic control operated in the port of Buenos Aires did not permit vessels arriving to load maize to proceed beyond a point in the roads called the Free Anchorage some 22 miles (three hours steaming time) from the dock area until they had obtained a "giro" or permit, which was issued by the customs authority on the ship's application only when the shipper had obtained from the Grain Board a certificate to the effect that cargo had been allocated. Once the giro had been obtained, the ship could proceed to the dock area, where vessels due to load grain usually lay, and wait there until a loading berth became available. At the relevant time supplies of maize were coming down to the port so slowly that by August, 1954,

(6) (1879) 12 Ch. D. 568.
(7) (1891) 2 Q.B. 647.
(8) (1908) 1 K.B. 499.
(9) (1961) A.C. 135.

there was a congestion of vessels arriving to load maize. On September 1, 1954, to meet the temporary emergency, the port authority changed the previous system of traffic control by passing a resolution that, before a giro could be issued, not only must the Grain Board's certificate be obtained, but also a cargo ready to be loaded must be available.

The AELLO arrived at the Free Anchorage on October 12, ready to proceed into the dock area; the shippers obtained the Grain Board's certificate on October 13; there was then no congestion in the dock area, but the charterers did not have a cargo of maize ready to be loaded until October 29. Accordingly as a giro could not, under the terms of the resolution of September 1, be issued, the ship was compelled to wait at the Free Anchorage until October 29.

Though various operations were carried on in the roads, no loading or unloading of grain ever took place at the Free Anchorage.

The charterers, contending that the AELLO was not an "arrived ship" until October 29, claimed, inter alia, the return of demurrage paid by them to the shipowners under protest. The shipowners by way of defence, or alternatively by way of counterclaim for damages for breach of contract, contended that, if the AELLO was not an "arrived ship" on October 12, that was due to the charterers' breach of their absolute obligation to provide a cargo in time. It was held—

(*1*) (Lord Radcliffe and Lord Cohen dissenting) that the AELLO was not an "arrived ship" until October 29, for when she was anchored in the roads she was not within the commercial area of the port, namely, that part of the port where a ship could be loaded when a berth was available; nor did the reasolution of September 1 have the effect of extending the commercial area to embrace the Free Anchorage;

(*2*) (Lord Keith of Avonholm dissenting) that where the provision of a cargo was necessary to enable the ship to perform its obligation of becoming an "arrived ship", the charterers were under an absolute obligation to provide a cargo, or a reasonable part of it, in time to enable the ship to perform its obligation under the contract: and the charterers were not relieved of that obligation by showing that they had before October 29 taken all reasonable steps to provide a cargo; and

(*3*) that the charterers' breach was a matter for counterclaim only.

The above principles have been set out in detail in Scrutton on Charterparties and Bills of Lading(10).

"LAY-DAYS"
"RUNNING DAYS"
"WORKING DAYS"
"WEATHER WORKING DAYS"

Now, the time allowed to the charterer for loading and discharging a ship is called *"lay days"*. Lay days are reckoned either by running days or working days. *"Running Days"* are consecutive days, running

(10) 17th ed. pp. 122-126.

from one date to another without any break or exception; "*Working Days*" are those days on which it is usual to work at the port, Sundays and holidays not being counted as lay days. "*Weather Working Days*" are all working days on which the weather allows of work of the particular kind in question being done.

Govt. of Ceylon v. *Societe F. D. Tunis*

In the case of *Government of Ceylon* v. *Societe Franco-Tunisienne D'Armement-Tunis*(11) by a charterparty in "Gencon" form* dated July 16, 1956, charterers chartered a vessel from shipowners to proceed to Antwerp and Bordeaux and there to load a part cargo of flour in bags for shipment to Colombo. The charterparty provided: "6 (see clause 16 attached) Time to commence at 2 p.m. if notice of readiness to discharge is given before noon . . . Time lost in waiting for berth to count as discharging time . . . 16. Cargo to be discharged . . . at the rate of 750 tons of 2,240 lb. per weather working day, Sundays and holidays excepted." By clause 30 the owners were at liberty to complete the cargo en route with other goods. The vessel duly proceeded to Antwerp and Bordeaux and then loaded a quantity of flour in bags, and thereafter proceeded to Colombo via Port Said. At Port Said the vessel loaded a completion cargo which was shipped by a number of shippers who were in no way connected with the charterers. Much of this cargo was overstowed above the flour cargo. The vessel arrived at and anchored in the outer anchorage of the port of Colombo at 0612 hours on October 18, 1956. Notice of readiness to discharge was given at 0900 hours on the same day. No berth was available until 0615 hours on Wednesday, October 24. Although the vessel was ready in every respect to begin discharging it would not have been possible to discharge the flour cargo which was overstowed until most of the Port Said cargo had been discharged. The vessel began discharging her cargo at 0730 hours on October 24 and completed the discharge by 0300 hours on November 3. The permitted lay time under clause 16 was 5 days 19 hours 45 minutes. All the flour cargo was not freely accessible for discharging until 0400 hours on Saturday, October 27. But for the unavailability of a berth between 1400 hours on October 18 and 0615 hours on October 24, the vessel would have been totally discharged 5 days 16 hours and 16 minutes earlier than she was. On a claim for demurrage, it was held,

(*1*) that on the true construction of clauses 6 and 16 of the charterparty "readiness to discharge" referred to readiness to discharge the flour cargo and not the cargo overstowed on the flour cargo;

(*2*) that lay time did not begin to run until all the flour cargo was accessible, namely, 0400 hours on Saturday, October 27;

(*3*) that the owners were entitled pursuant to clause 6 to add the time spent waiting for a berth to the discharging time;

(11) (1962) 2 Q.B. 416.
*See Appendix.

(*4*) that notice of readiness having been given at 0900 hours on October 18, 1956, no further notice of readiness needed to be given when the vessel was ready to discharge, so that lay time started at 0400 hours on October 27, 1956; and

(*5*) that time lost waiting for a berth should be added at the end of the lay days.

Reardon Smith Line v. *Ministry of Agriculture*

The House of Lords in the case of *Reardon Smith Line* v. *Ministry of Agriculture*(12) dealt, inter alia, with the meanings of the expressions "*weather working days*" and "*working days*" in charterparties. In that case shipowners chartered the QUEEN CITY to the respondents under a charterparty dated November 12, 1952, which provided by clause 1: ". . . Vessel . . . shall receive on board . . . a full and complete cargo . . . of wheat in bulk, . . . and/or barley in bulk, and/or flour in sacks as below which (the charterers) bind themselves shall be shipped . . . Charterer has the option of loading up to one-third cargo of barley in bulk . . . Charterer has the option of loading up to one-third cargo of flour in bags . . ."

By clause 15: "Six *weather working lay days* (Sundays, holidays, and rainy days not to be counted as lay or *working days* . . .) to commence twenty-four hours after . . . notice of readiness . . . despatch money . . . shall be payable for all working time saved in loading at the rate of one-half of demurrage rate per day or pro rata. . ." By clause 31: "Lay or *working days* shall not count at ports of loading during any time when . . . the loading of the cargo or the intended cargo, or any part thereof, is delayed by . . . strikes . . . or any other hindrance of whatsoever nature beyond the charterers' control . . ."

The QUEEN CITY was ordered to Vancouver on February 12, 1953, and gave notice of readiness to load on February 18. On the night of February 16/17, a strike of elevator men at five out of the seven grain elevators at Vancouver prevented the ship from loading a full and complete cargo of wheat. The charterers made no attempt to exercise their option to load alternative part cargoes of barley or flour. The ship lay at Vancouver until, the strike having ended on May 7, she began loading on that day and completed a full cargo of wheat by May 12. During those six days the weather was fine and did not prevent loading, but one of the days was a Saturday which did not form part of the elevator men's normal 5 day working week. If required, the elevator men did in fact work on Saturdays at time and a half rates. The longshoremen whose labour was also required for loading grain worked a 5½ days week, which included Saturday mornings.

It was not disputed that the loading of wheat in bulk was delayed by the elevator strike and that the strike was to be regarded as the cause of the delay for the purposes of clause 31.

(12) (1963) A.C. 691. See *"The Mosfield"*, (1968) 2 Lloyd's Rep. 173.

In proceedings by the shipowners for demurrage and by the charterers for despatch money, the Court of Appeal held that the options to load alternative cargoes were true options and the charterers were not bound to load alternative cargoes and, accordingly, the shipowners were not entitled to demurrage; and that Saturday was not a working day and therefore the charterers were entitled to despatch money.

There was no relevant distinction between the case of the QUEEN CITY and those of the CAPE RODNEY and RIVERTON, the ships concerned in the other two appeals which were heard together. On the shipowners' appeals against the decision of the Court of Appeal it was held, (*1*) that on the true construction of the charterparty, the charterers' primary obligation under clause 1 was to ship a full and complete cargo of wheat only; the words "as below" referred to the options which were true and unfettered options to ship alternative cargoes within the permitted proportions and there was no obligation on the charterers to lose the protection afforded by clause 31 in respect of their wheat cargo, by exercising their options; and

(*2*) that "*working day*" in relation to lay days described a day, consisting of 24 hours, which was a day of work, as distinguished from a day of play or rest; a "*weather working day*" meant a working day that was not unavailable to work because of weather; accordingly, as Saturday was not a holiday at Vancouver and the possibilities of working were not affected by bad weather, Saturday counted as a whole lay day, and the fact that Saturday working was not within the normal working hours of an individual trade or employee was irrelevant.

And Lord Keith of Avonholm expressed the view that there may be circumstances in which local custom at a port may introduce other considerations into the treatment of "*weather working days*".

It was further held in that case—

(*1*) that in computing "*weather working days*" in relation to the weather, fractions should be allowed; a reasonable apportionment of the day should be made as a question of fact according to the incidence of the weather upon the length of day that the parties either were working or might be expected to have been working at the time; and

(*2*) that there was no justification as a matter of construction for taking "*weather working days*" as being limited to the hours paid for at normal rates.

It is gratifying to note that instead of the expression "per weather working day of 24 consecutive hours" the expression "*per working day of 24 consecutive hours, weather permitting*" is extensively used now, thus eliminating all complications regarding the interpretation of the words "*weather working day*" under the British law, and ensuring that time actually lost by bad weather periods which prevented the discharge of the particular vessel will be deducted. The principles to be applied under this expression are that "periods of bad weather are discountable—

(*a*) if the weather is unsuitable for discharging the particular cargo in question, and

(*b*) discharging would have taken place but for the unsuitable weather."

In other words, the actual time from the time when work is suspended owing to bad weather until the weather is again suitable for discharging will be deducted.

STOWING GOODS

Canadian Transport Co. v. *Court Line*

As regards loading, Lord Wright observed in the case of *Canadian Transport Co.* v. *Court Line*(13) :

"It is, apart from special provisions or circumstances, part of the ship's duty to stow the goods properly. . . In modern times the work of stowage is generally deputed to stevedores, but that does not generally relieve the shipowners of their duty, even though the stevedores are under the charterparty to be appointed by the charterers, unless there are special provisions which either expressly or inferentially have that effect."

And with reference to the commonly used clause in a charterparty to the effect that the charterers are to load, stow and trim the cargo, Lord Wright said in the same case(13) :

"I think that these words necessarily import that the charterers take into their hands the business of loading and stowing the cargo. It must follow that they not only relieve the ship of the duty of loading and stowing, but as between themselves and the shipowners, relieve them of liability for bad stowage, except as qualified by the words 'under the supervision of the captain'. . . . These words expressly give the master a right which I think he must in any case have—namely, a right to supervise the operations of the charterers in loading and stowing. . . . To the extent that the master exercises supervision, and limits the charterers' control of the stowage, the charterers' liability will be limited in a corresponding degree."

CHARTERER'S DUTIES

When the ship is ready to load and the charterer is duly notified, it becomes his duty to—

(*a*) procure the stipulated cargo,

(*b*) bring the cargo to the loading place,

(*c*) load a full and complete cargo, and

(*d*) load in the time stipulated.

(a) TO PROCURE THE STIPULATED CARGO

As to (*a*). The charter presupposes that the charterer has the cargo ready on the quay, and it does not, as a rule, concern the shipowner as

(13) (1940) A.C. 934, 943-4.

to whence the cargo is to be procured or how it is to be conveyed to the place of loading. The charterer is, as a general rule, responsible for a failure to procure a cargo in due time or at all, and the impossibility of procuring the cargo does not excuse him. But the charterer will be excused in the following cases :—

(*1*) where an event, such as the outbreak of war, has rendered performance of the contract illegal by the law of the country in which performance was to have taken place as being tantamount to trading with an enemy ;
(*2*) where the shipowner has broken a condition precedent, such as the undertaking as to seaworthiness ;
(*3*) where the charter contains a provision expressly relieving the charterer, as in case of riots, strikes or any other accidents beyond the charterer's control likely to prevent or delay the loading ;
(*4*) where the whole adventure has been frustrated ; and
(*5*) where the failure to load is due to the shipowner's default, provided that he has no legal excuse for such default.

(b) TO BRING THE CARGO TO THE LOADING PLACE "ALONGSIDE"

As to (*b*). Where the contract provides that the cargo is to be brought "alongside" by the charterer, the expense and risk of doing so is transferred to him. He must actually bring the cargo to the ship's side, and, if necessary, bear the cost of lighterage. In ordinary circumstances goods to be brought to or taken from "alongside" must be delivered immediately alongside, i.e., to or from the ship's tackle in such a position that the consignee can begin to act upon them. So long as the cargo is delivered alongside the mutual obligations of shipowner and receiver may be ascertained by evidence of the customary method of discharge ; e.g., the shipowner may be obliged by custom to stack the cargo on shore or stow it in barges, but he cannot be required in dealing with it to place it in a position which is not alongside the ship. The incidence of this customary method may, however, be excluded by apt words, e.g., "any custom of the port to the contrary notwithstanding."

Grant v. *Coverdale*

If loading was rendered commercially impossible by an excepted peril, the charterer will be excused, even though it was not absolutely impossible to load. Thus in *Grant* v. *Coverdale*(14) a ship was to proceed to Cardiff and load iron. The time for loading was to commence as soon as the vessel was ready to load except in cases of strikes, frosts, or other unavoidable accidents preventing loading. Owing to frost, delay occurred in bringing the cargo to the dock. It was held that the charterer was liable.

(14) (1884) 9 App. Cas. 470.

Where there is no storing accommodation at the port, the charterer will be entitled to the benefit of the excepted perils during the transit from the storing places, provided such transit substantially forms part of the operation of loading, for the parties are taken to have contracted with that reservation in mind(15).

(c) TO LOAD A FULL AND COMPLETE CARGO

"FULL AND COMPLETE CARGO"

As to (*c*). The expression "full and complete cargo" means a full and complete cargo according to the custom of the port of loading(16).

Where the charterer is under an obligation to load a full cargo and has the option of loading several kinds of goods, he cannot choose to load goods which leave broken stowage and no others; he is obliged to fill up the spaces. But the charterer may be excused from liability for broken stowage by a custom of the port of loading. Thus, a charter-party provided for a "full and complete cargo of sugar, molasses and/or other lawful produce". It was customary at the port of loading to load sugar and molasses in hogsheads and puncheons. This was done; but spaces were left large enough to take small packages of sugar, cocoa, etc. It was held that it was sufficient for the charterer to load in the customary way(16).

Where a vessel is chartered as of a certain capacity, and the charterer undertakes to load a "full and complete cargo," he cannot limit his liability by the capacity named in the charter, but must load as much cargo as the ship will carry with safety.

But where a certain number of tons is stipulated for in the clause as to "cargo," that number and not the actual capacity of the vessel will constitute the approximate measure of the charterer's obligation.

On the other hand, a charter for a "full and complete cargo," subject to stipulated maximum and minimum quantities, renders the charterer liable to load either a full and complete cargo or the stated maximum, whichever is the less, the owners giving a warranty that the ship can carry the minimum. Where the charterer fails to load a full and complete cargo, the shipowners may, if such course is reasonable, fill up with other cargo in order to minimise the damages and may delay for a reasonable time in so doing.

Where the ship is stowed in a manner that does not make full use of her hold, but the charterer or his agents saw the stowage and made no objection, the shipowner will not be liable for not loading a full and complete cargo(17).

"DEAD FREIGHT"

In the absence of express stipulation in the charterparty the charterer

(15) *Hudson* v. *Ede*, (1868) L.R. 3 Q.B. 412.
(16) *Cuthbert* v. *Cumming*, (1856) 11 Ex. 405.
(17) Scrutton, 17 ed., pp. 143-4.

is liable in damages for not producing a full cargo; such damages are styled "dead freight"(18).

Where the cargo to be carried can be loaded in two different ways, one of which is more economical of space than the other, but each of which is a usual method of loading cargo of the relevant type, the charterer can load in whichever of these ways he pleases, unless he is expressly forbidden so to do by the charterparty: the mere fact that he is under a duty to load a full and complete cargo will not suffice to deprive him of this choice, or to render him liable for dead freight as the result merely of adopting the less economical method(19).

Brightman v. *Bunge*; *Reardon Smith Line* v. *Ministry of Agriculture*

Again, where the charterparty states that the charterer is entitled to load an alternative cargo, *e.g.*, wheat and/or maize and/or rye, and after the loading of the wheat has commenced the export of wheat is prohibited, it is implied that he should be given a reasonable time to determine how to deal with the altered conditions and make arrangements to ship a cargo which can be loaded. But the allowance of a reasonable time has not yet been the subject of decision in the House of Lords, though it was approved by Lord Atkinson in *Brightman* v. *Bunge*(20) and discussed by Lord Radcliffe and Lord Devlin in *Reardon Smith Line* v. *Ministry of Agriculture*(21).

"LAWFUL MERCHANDISE"

Now, to be "lawful merchandise" goods loaded under the charterparty must not only be such as can be loaded without breach of the law in force at the port of loading, but must also be such as can lawfully be carried and discharged at the port of discharge(22).

(d) TO LOAD IN THE TIME STIPULATED

As to (d). Unless the cargo is loaded within the stipulated time the charterer becomes liable to pay demurrage or damages for detention of the ship, as the case may be.

"DEMURRAGE"
"DAMAGES FOR DETENTION"

Demurrage, in its strict meaning, is a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading. Where the sum is only to be paid for a fixed number of days, and a further delay takes place, the shipowner's remedy is to recover unliquidated "damages for deten-

(18) *McLean* v. *Fleming*, (1872) 25 L.T. 317.
(19) *Angfartygs* v. *Price & Pierce*, (1939) 64 Ll.L.R. 290 C.A.
(20) (1925) A.C. 799.
(21) (1963) A.C. 691.
(22) *Leolga* v. *John Glynn*, (1953) 1 W.L.R. 846.

tion" for the period of the delay. The phrase "demurrage" is sometimes loosely used to cover both these meanings(23).

Demurrage becomes payable when the lay-days allowed for loading or unloading have expired. Such lay-days begin when the ship arrives at the place agreed upon in the charter for the commencement of lay-days, and is there ready to proceed to her loading or discharging berth and prepared to load or discharge when she gets there. They run continuously in the absence of express agreement or custom of the port to the contrary from that date. When the lay-days have expired, demurrage in the absence of express agreement runs continuously from the end of the lay-days until the loading or discharging is completed(24).

When once a vessel is on demurrage no exceptions will operate to prevent demurrage continuing to be payable unless the exceptions clause is clearly worded so as to have that effect(25). The general principle seems to be : "Once on demurrage always on demurrage."

DAMAGES FOR DETENTION, WHEN PAYABLE

Damages for detention (where damurrage is not provided for) become payable either :

(*1*) On the expiration of the specified lay-days, if any ; or

(*2*) On the expiration of a reasonable time for loading or unloading when no lay-days are specified ; or

(*3*) On the expiration of the fixed number of days for which demurrage has been stipulated.

A charterer may also be liable for damages for detention of the ship during the voyage caused by his shipping cargo that involves such detention.

He may also be liable for damages for detention of the ship if by his breach of contract he delays her in the course of the voyage, e.g., by failure, at a port of call for orders, to give orders in due time, or by his delay in presenting bills of lading for signature, or by his wrongful insistence on a particular method of discharge resulting in delay to the ship in reaching her discharging place(26).

"DISPATCH MONEY"

"Dispatch money" is a bonus paid by the shipowner to the charterer for loading or discharging his ship before the stipulated lay-days have expired.

Where a charterparty gives the charterers a right to "average" the days allowed for loading and discharging, the time on demurrage at the port of loading is set against the time saved at the port of discharge,

(23) Scrutton, 17th ed. p. 305. See also *The Jevington Court*, (1966) 1 Lloyd's Rep. 683.

(24) *Ibid*, pp. 307-8.

(25) *Compania Naviera Aeolus* v. *Union of India*, (1962) 2 W.L.R. 1123 (H.L.).

(26) Scrutton, 17th ed., p. 309.

or vice versa, and the payment of demurrage or dispatch money will depend on the net result*

There are few branches of the law which raise nicer points than those arising out of clauses defining lay time for loading and discharging, and providing for the calculation of demurrage and dispatch money. Any statement of principles is difficult, however, because of the variety of language used in the clauses(27).

DEMURRAGE, BY WHOM PAYABLE

Now, usually it will be the charterer who will be liable for the payment of demurrage.

If it is desired to make shippers or consignees, other than persons who are parties to the charterparty, liable for demurrage agreed on in the charterparty, there must be a clear stipulation to that effect in the bill of lading. The stipulation usually takes the form *"freight and all other conditions as per charter."*

Even where the ship is not under charter, the bill of lading which is issued may make the shipper, consignee or holder of the bill of lading liable to pay demurrage.

The charterparty or bill of lading often gives the shipowner a lien in respect of demurrage and damages for detention.

"CESSER CLAUSE"

The charterparty often contains a *"cesser clause"* which purports to relieve the charterer on shipment of the cargo from paying demurrage, but in each case it is a question of construction whether it does relieve him in fact(28). The tendency is to hold that the exemption granted to the charterer is co-extensive with the lien conferred on the shipowner by the bill of lading on the cargo for demurrage and dead freight.

LIEN FOR DEMURRAGE

Gray v. *Carr*

Where there is a demurrage clause in the charterparty, the lien for demurrage does not include a lien for damages for detention. Thus, in *Gray* v. *Carr*(29), the charterparty provided that the charterer's liability was to cease on shipment of the cargo, allowed ten days' demurrage, and gave a "lien for demurrage". The bill of lading provided for "freight and all other conditions or demurrage as per charter". The ship was detained at the port of loading beyond the ten days allowed on demurrage by the charterparty. It was held that the shipowner had a lien as against consignees under the bill of lading for the ten days' demurrage, but not for the detention beyond that time.

(27) *Ibid*, p. 310, where and in a few pages following it a number of relevant authorities have been cited.
(28) Payne, 8th ed., p. 162.
(29) (1871) L.R. 6 Q.B. 522.
**Alma Shipping Co.* v. *V. M. Salgaoncar*, (1954) 1 W.L.R. 650.

It seems that the principle to follow is that the charterer's exemption should be co-extensive with the shipowner's lien. Accordingly, where there is no lien, as in the case of unliquidated damages in the absence of express agreement, there should be no exemption for the charterer(30).

Where delay was due to detention of the vessel, and the demurrage provisions applied thereto, it was held that the damages obtainable were limited to the demurrage payments(31).

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(30) Scrutton, 17th ed., p. 166.
(31) *Suisse Atlantique* v. *N.V.R.K. Centrale,* (1966) 2 W.L.R. 944 (H.L.).

LECTURE VI

PERFORMANCE OF CONTRACT

The subject which requires consideration after "loading" is "prosecution of the voyage."

SAILING FROM PORT

When the loading is completed and all things are prepared for the commencement of the voyage, it is the duty of the master to obtain the necessary clearances, or permission to sail, from the proper officer at the port of loading, and, except where, by the terms of the charter-party, the charterer has undertaken to do so, to pay the necessary port and other charges for that purpose, including light dues, when payable. Until this duty has been performed, the ship is not ready to commence her voyage. Upon obtaining his clearances, it is the duty of the master to begin the voyage without delay. Where no time is specified for the ship's departure, the master is bound to start within a reasonable time. He need not, therefore, put to sea at once, if the weather is unpropitious, considering the nature of the ship, but may wait until the weather moderates. If, however, the master has no lawful excuse for his delay in starting, the shipowner is liable to the shipper for the consequences, since the shipper's duty is fulfilled when the loading is completed. All risk of subsequent delay falls upon the shipowner, for example, the risk of the detention of the ship through inability to obtain her clearances, or by the inability of the ship to proceed upon the voyage, unless the cause of such inability is covered by an exception. To constitute a final sailing the vessel must have taken her final departure from her port of loading, and must be at sea, outside the limits of the port in the commercial sense of the word, ready to proceed upon her voyage. It is not necessary that she should be progressing under her own sail, steam or power, since she may be in charge of a tug; nor need she be making progress at all, since she may cast anchor in a road-stead outside for the purpose of awaiting more favourable weather; she has, nevertheless, got clear of the port for the purpose of proceeding on the voyage, and she has, therefore, finally sailed within the meaning of the contract. If, at the time of her departure, she had no intention of returning, it is immaterial that she is afterwards compelled to return to the port of loading or is driven within its limits by stress of weather. If, however, the ship, at the time when she leaves the port, is not ready to proceed upon the voyage, either because she is not fully equipped or properly manned, or because the bills of lading have not been signed, or her clearances obtained and if she leaves the port with the intention of anchoring or waiting outside until the necessary prepara-

tions have been completed, the fact that she has got clear of the port without any intention of returning does not constitute a final sailing, since she is not at that moment in a position to proceed. If, therefore, she is lost before such preparations are completed, no advance freight is payable(1).

"PORT"

Leonis Co. v. *Rank*

The Aello

Now, in its commercial sense the word "port" signifies the commercial area known and treated as the port by all persons engaged in the shipping of merchandise, whether as shippers, charterers or shipowners. And the commercial area of the port is that part of the port where a ship can be loaded with the relevant cargo when a berth is available, albeit she cannot be loaded until a berth is available. This definition of the expression "commercial area" which originated in *Leonis Co.* v. *Rank*(2) was approved by the majority of their Lordships in the House of Lords in the case of *The Aello*(3).

MASTER'S DUTY TO KEEP SHIP SEAWORTHY

After commencing the voyage the master must ordinarily proceed without delay and deviation to the port of discharge. He must, as far as possible, maintain the vessel in a seaworthy condition throughout the voyage, and, if she becomes unseaworthy, he must execute necessary repairs, provided that he has a reasonable opportunity of doing so without unreasonable delay or expense to the various interests involved. If the master fails to perform his duty in this respect, the shipowner is responsible to the owners of the goods on board his ship for any damage resulting, except in so far as he may be excused by the terms of the contract. Even where the unseaworthiness is caused by an excepted peril, it is the duty of the master to remedy it by every reasonable means in his power; otherwise he is guilty of negligence, and the shipowner is not excused, unless he is protected by the terms of his contract against the consequences of the master's negligence. Thus, where the actual safety of the ship, and consequently of the cargo, is endangered, it is the duty of the master, if possible, to save his ship by removing the cause of danger, as, for instance, by stopping up a leak, or keeping down the water in the holds by pumping, or by returning to the port of loading or proceeding to a port of refuge for the purpose of executing the necessary repairs. When once the vessel has reached a port of refuge, she must not proceed to sea again in an unseaworthy condition, since otherwise the shipowner is responsible for

(1) Halsbury's *Laws of England*, Simonds ed., Vol. XXXV, paras. 585-7.
(2) (1908) 1 K.B. 499, 520 (per Kennedy L.J.).
(3) (1961) A.C. 135.

the master's negligence in leaving the port of refuge without repairing(4).

MASTER'S POWER OVER CARGO

For the purpose of ensuring the due prosecution of the voyage and of maintaining the ship in a seaworthy condition, the master has certain powers over the cargo, the exercise of which, however, is subject to various restrictions. He may, where the circumstances of the particular case justify it, sacrifice the whole or a portion of the cargo, for the purpose of preserving the ship and the rest of the cargo, by jettisoning goods to lighten the ship or by burning them to enable the fires to be kept up under the boilers. He may sell a portion, but not the whole, of the cargo for the purpose of raising funds to defray the expenses of such repairs as may be necessary to enable the ship to complete the voyage, and for the same purpose he may hypothecate even the whole of the cargo. No portion of the cargo, however, must be sold or hypothecated unless the master is unable to raise funds in any other way, and unless there is a prospect of benefit, direct or indirect, to the owners of the cargo. Ship and freight are the primary resources, and until these are exhausted recourse may not be had to cargo(5).

The right of contribution in respect of jettisoned cargo is based on the danger to ship and cargo requiring sacrifice to which all must contribute. Such right does not belong to the wrongdoers whose acts have led to the jettison, or to those who are legally responsible for them.

Where a ship is stranded through the negligence of her master, and thereby ship and cargo are placed in a position of such imminent danger as to make it prudent and necessary to jettison part of the cargo in order to save the remainder and the ship, it was held that innocent owners of jettisoned cargo are entitled to general average, *secus* with regard to the owners of the ship unless their ordinary relations to the shippers have been varied by contract.

The rules of maritime law relating to the rights and remedies resulting from a proper case of jettison are :—

(*1*) Each owner of jettisoned goods becomes a creditor of ship and cargo saved.

(*2*) He has a direct claim against each of the owners of ship and cargo for a *pro rata* contribution towards his indemnity, which he can recover (*a*) by direct action ; (*b*) by enforcing through the ship master, who is his agent for that purpose, a lien on each parcel of goods salved to answer its proportionate liability*.

If the ship is disabled from continuing her voyage, the master is entitled to tranship the cargo and convey it upon another ship to its destination. If he is unable to do so, he may abandon the voyage, in which case the owner of the cargo is entitled to claim delivery of his

(4) Halsbury's *Laws*, Simonds ed., Vol. XXXV, para. 589.
(5) *Ibid*, para. 590.
**Strang, Steel & Co.* v. *A. Scott & Co.*, (1889) 16 I.A. 240.

cargo at the place where the voyage is abandoned. Except, however, where the failure to continue the voyage is attributable to some excepted peril, the shipowner in abandoning the voyage is guilty of a breach of contract, since he has engaged to convey the cargo to its destination, and the owner of the cargo is entitled to recover any damages which he may have sustained(5).

MASTER'S AUTHORITY, WHENCE DERIVED

The master's authority, in the absence of express instructions, to deal with the ship and goods in a manner not consistent with the ordinary carrying out of the contract, as by selling the goods, throwing them overboard, or pledging them for advances of money depends on two circumstances :

(*1*) the necessity for the action ; and
(*2*) the impossibility of communicating with his principals, whether shipowners or cargo-owners(6).

(1) NECESSITY

Australasian S. N. Co. v. *Morse*

As regards necessity, the test to be applied is this : Was the action taken such as a prudent man with full knowledge of all facts would approve as being likely to prove beneficial in the interests of the adventure ? Thus, in one case(7) a vessel with a cargo of wool was wrecked off the coast of Queensland, and the wool was taken out of her in a damaged state and brought to Rockhampton. It appeared that it was in such a state that it could neither be carried on nor stored ; that it would in two or three days have lost nearly all value, unless it were at once treated by various processes ; and that such treatment could not be obtained on a large scale. The wool was accordingly sold by the master to a number of purchasers in small lots. The jury found that he had acted for the best, and as a wise and prudent man, for the interest of the owners of the wool. It was held in the Privy Council that the sale was justified. In delivering judgment Sir Montague Smith said :

"The word 'necessity', when applied to mercantile affairs, where the judgment must in the nature of things be exercised, cannot, of course, mean an irresistible compelling power—what is meant by it in such cases is the force of circumstances which determine the course a man ought to take. Thus, where by the force of circumstances, a man has the duty cast upon him of taking some action for another, and, under that obligation adopts a course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken that it was in a mercantile sense necessary to take

(6) Scrutton, 17th ed., pp. 255-6.
(7) *Australasian Steam Navigation Co.* v. *Morse*, (1872) L.R. 4 P.C. 222.

it. . . A sale of a cargo by the master may obviously be necessary in the above sense of the word, although another course might have been taken in dealing with it. For instance, if in this case the wool, which had no value but as an article of commerce, could have been dried and re-packed, and then stored or sent on, but at a cost to the owner clearly exceeding any possible value of it to him when so treated, it would plainly have been the duty of the master to sell, as a better course for the interest of the owner of the property, than to save it by incurring on his behalf a wasteful expenditure. In other words, a commercial necessity for the sale would then arise, justifying the master in resorting to it(8)."

Cannan v. *Meaburn*

But the sale was held not justified in another case(9) where a ship on a voyage from Calcutta to London put into Mauritius in a sinking state, the effect of bad weather. The captain, finding, as he considered, that the expense of repairing the ship would be so great as to frustrate the adventure, placed her and her cargo at the disposal of the Vice-Admiralty Court, and they were sold by order of that court. The plaintiff was the owner of seventy-two chests of indigo, which formed part of the cargo, and he sued the shipowners for not delivering them. The jury found that the ship might have been repaired, and also that the goods might have been transhipped and forwarded. It was held that the sale was not justified, and that the shipowners were liable.

Now, if money can be obtained from the shipowner's or cargo-owner's agent in the port, or raised on personal credit, the master will not be justified in binding the ship or cargo by a bottomry bond; but if the carriage of the cargo cannot be completed with profit to the cargo-owner without raising money on security of the cargo such a course will be justified(10).

Where such a necessity of dealing with the cargo arises, the captain in dealing with the cargo acts as the agent of the cargo-owner; if no such necessity exists, or if the necessity arises from wrongful acts or omissions on the part of the shipowner or his servants, or if the captain professes to act for the shipowner, he will be treated as the agent of the ship-owner(11).

(2) COMMUNICATION WITH CARGO-OWNERS NOT POSSIBLE

The master's authority to bind the cargo-owners rests upon the fact that the circumstances require immediate action in the interests of the cargo, and that nobody but the master can decide what shall be done in time to take such immediate action. If the cargo-owners can be communicated with and can give directions in time, the necessity for the

(8) *Ibid*, pp. 230-1.
(9) *Cannan* v. *Meaburn*, (1823) 1 Bing. 243, 465.
(10) *The Onward*, L.R. 4 A, & E. 38.
(11) Scrutton, 17th ed., p. 256.

master's action does not arise. Nowadays wireless and submarine cable have enabled the owner to perform much of the master's work in foreign ports.

The necessity for communication with cargo-owners will be much lessened in cases where the action of the master primarily affects the ship, as in repairs of the ship, or deviations by necessity causing delay, or where, the ship being a general one, there are many owners of cargo.

Such communication need only be made where an answer can be obtained from the cargo-owners, or there is reasonable expectation that it can be obtained, before it becomes necessary to take action. If there are reasonable grounds for such an expectation, the master should use every means in his power to obtain such an answer.

The information furnished must be full, and must include a statement of any measure, such as sale, raising money on bottomry, etc., which the master proposes to take.

If the master communicates and receives instructions, he is bound to follow them, if consistent with his duty to the shipowner; if he communicates and receives no instructions, he may take such action as appears necessary; if he can communicate and does not do so, he cannot justifiably take any action on behalf of the cargo-owner(12).

MASTER'S DUTY TO TAKE REASONABLE CARE OF GOODS

The master, as representing the shipowner, has the duty of taking reasonable care of the goods entrusted to him, by doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, e.g., by ventilation, pumping or other proper means.

He has also the duty of taking reasonable measures though necessitating expense to prevent or check the loss or deterioration of the goods even by reason of accidents for the necessary consequences of which the shipowner is by reason of the bill of lading under no original liability, and the shipowner will be liable for any neglect of such duty by the master(13).

MASTER'S POWER TO SELL DAMAGED GOODS

Again, the condition of the goods may be such that immediate sale is the wisest course in the interests of the cargo-owner; in such a case the master, if he cannot communicate with the cargo-owner and receive his instructions, will be entitled and bound to sell them. If, however, the master can, but does not, communicate with the cargo-owner before selling the goods, the cargo-owner will be entitled to recover damages for conversion, even though the sale is reasonable(14).

MASTER'S POWER OF TRANSHIPMENT

And where a vessel in which goods are shipped is hindered by an

(12) *Ibid*, pp. 257-8.
(13) *Ibid.*, pp. 268-9.
(14) *Ibid.*, p. 270.

excepted peril from completing the contract voyage, the shipowner must, if the obstacle can be overcome by reasonable expenditure or delay, do his best to overcome it. It is only where an expected peril renders the completion of the voyage physically impossible, or so clearly unreasonable as to be impossible from a business point of view, that the shipowner is justified in throwing up the voyage without the consent of the charterer or shipper. But the shipowner has the right to earn his freight either by repairing his own ship and proceeding to the port of destination, or by transhipping the goods into another vessel to be forwarded thither, and he may delay the transit a reasonable time for either of these purposes. In case of justifiable transhipment by the master as agent for the shipowner, the cargo-owner will be bound to pay the full freight originally contracted for, though the transhipment was effected by the shipowner at a smaller freight. If the hindrance of the ship's voyage is not caused by an excepted peril, the shipowner is not entitled as of right to tranship on his own account on terms more onerous to the shipper than the original contract (though he may be bound to do so on account of the cargo-owner); but he is liable for delay or failure to deliver. In many bills of lading (especially through bills of lading and bills issued by regular steamship lines) there is an express provision that the shipowner shall have liberty to tranship and forward the goods "by any other line", or "by any other steamer or steamers(15)."

BOTTOMRY BOND AND RESPONDENTIA BOND

When it is desired in case of necessity to raise money upon the ship, or upon ship and cargo, or upon ship and freight, a written instrument is executed by the master binding him to repay the money within a limited time of arrival safe at home, and in the meantime assigning the ship and freight, and sometimes the cargo, as security. This instrument is called a "bottomry bond"(16). It is an essential characteristic of the contract that the repayment of the money advanced should be dependent upon the safe arrival at the port of destination of the ship(17). The effect of the bond is to give the bondholder a claim preferential to that of a mortgagee. The holder of the last bond ranks first, and so on upwards.

When the cargo alone is hypothecated, the bond given is properly termed a "respondentia bond", but the expression "bottomry bond" is often also used in this sense.

The master's authority to jettison goods properly stowed arises in the case of necessity. If no such necessity exists, or if the goods jettisoned were improperly stowed, the master acts as the agent of the shipowner, who becomes liable for his acts, unless protected by exceptions.

(15) *Ibid.*, pp. 271-2.
(16) *The Mary Ann*, (1866) L.R. 1 Ad. & Ec. 13.
(17) *The Haabet*, (1899) p. 295.

GENERAL AVERAGE

"All loss", said Lawrence J.,(18) "which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested". The above definition has stood the test of time and it is still regarded as the standard definition.

The word "average", about the origin of which considerable doubt exists, may be taken to mean material damage or pecuniary loss sustained in the course of a marine adventure, and the terms "particular" and "general" denote the character of the loss.

PARTICULAR AVERAGE

A "particular average loss" is a partial loss fortuitously caused by a maritime peril and is different from a "general average loss", which is a loss voluntarily incurred for common safety.

DISTINCTION BETWEEN GENERAL AVERAGE AND PARTICULAR AVERAGE

Particular Average and General Average may be broadly defined as follows :—

PARTICULAR AVERAGE is a partial loss—	GENERAL AVERAGE is a partial loss—
(*1*) due to purely accidental causes, e.g., stranding, fire, collision, &c.,	(*1*) voluntarily and reasonably incurred in time of peril for the safety of the joint adventure ;
(*2*) which is borne by the owner of the property damaged, e.g., ship or cargo, as the case may be.	(*2*) which is contributed to by the owners of all property saved, e.g., ship, freight and cargo.

Particular average, then, is an accidental loss which concerns only the owner of the property damaged and, if it is insured, his underwriters.

General average, on the contrary, is the result of a voluntary act, and the loss is subject to contribution by the owners of all the property saved by the general average act. These interests are usually the ship, the freight in the course of being earned, and the cargo respectively. The liability to contribute to general average arises primarily out of the carriage of goods by sea, and is, in England a common law liability to which the owners of the property are subject, whether they are insured or not. Thus, to obtain a proper understanding of the subject of general average all considerations of insurance should in the first instance be disregarded(19).

ORIGIN OF GENERAL AVERAGE

The origin of general average is lost in the mists of antiquity.

(18) *Birkley* v. *Presgrave*, (1801) 1 East 220, 228.
(19) *Lloyd's Calendar*, (1967), p. 241 et seq.

Historical records, however, show that it was a system in force in the very earliest days of seaborne traffic, and had for its object the attainment of safety from a peril threatening the joint adventure by encouraging the owners of cargo to permit their shipmaster to make a judicious and timely sacrifice of their property in the knowledge that their loss would be made good to them by rateable contribution from the other interests on the completion of the voyage.

The first legal recognition of this custom appears in the Rhodian Law. The law of General Average is built upon or around a small fragment of ancient Greek legislation, which forms the text for a chapter in the Digest of Justinian. Translated into English the said text is to the following effect :

> "The Rhodian law decrees that if in order to lighten a ship merchandise is thrown overboard, that which has been given for all shall be replaced by the contribution of all."

This short sentence contains both the principle and a perfect example of the peculiar communism to which seafaring men are brought in extremities. What is given, or sacrificed, in time of danger, for the sake of all, is to be replaced by a general contribution on the part of all who have been thereby brought to safety. This is a rule which from the oldest recorded times has been universal amongst seafaring men, no matter to what country they belonged, being obviously founded on the necessities of their position(20).

Time has proved the wisdom and equity of this old custom, which is now universally recognised as a law of the sea by all maritime countries and is in most cases embodied in the form of a general average code. In England, however, no such code exists, and although at first sight this may appear to be a drawback, it is not so found in practice, as the records of numerous decisions in the Courts of Law, combined with the Rules of Practice of the Association of Average Adjusters, which in many instances are derived from the old customs of Lloyd's, provide in themselves an adequate working system based upon knowledge acquired by actual experience, the authority of which has been still further strengthened by the Marine Insurance Act of 1906.

Upon the termination of the adventure the losses admissible in general average are assessed and apportioned over the net arrived values of the property saved plus the value of the sacrificed property which has been admitted in general average, and a final balance due to or from each individual is then arrived at by comparing the loss admitted in general average for his account with the general average contribution due from him. This process, which is called "adjustment", is governed by the law and practice of the port where the adventure terminates, unless the contract of affreightment otherwise provides.

(20) *British Shipping Laws*, Vol. VII, para. 1.

YORK-ANTWERP RULES

The foregoing remarks respecting English law are, therefore, only applicable in cases where the adventure terminates at a British port, or at a port where British law prevails. If the port of adjustment is in a foreign country, all questions of general average are dealt with in accordance with the law and practice there prevailing, and it will be found that the foreign law in most cases differs more or less from English law and practice. It is, however, permissible by express agreement between ship and cargo to provide that general average shall be governed by any recognised law or code and it is now an almost universal custom to incorporate in the contract of affreightment (i.e. charterparty or bill of lading) a provision that general average shall be adjusted according to the York-Antwerp Rules. The purpose of these rules is the attainment of international uniformity in the adjustment of general average. The first steps towards international agreement on general average were taken in 1860, and the first edition of the rules, known as the York Rules, was drawn up in 1864. The York Rules became the York-Antwerp Rules as the result of an international conference held at Liverpool in 1890, and the 1890 edition was revised and extended in 1924. A further revision of the York-Antwerp Rules took place in 1949 and the amended rules, known as the York-Antwerp Rules, 1950, have been approved and adopted by the leading shipping and insurance interests in England and many other countries. A reference to bills of lading and charterparties commonly used in these countries, including India, will establish this.

THE YORK-ANTWERP RULES, 1950

The York-Antwerp Rules, 1950, were adopted at the Amsterdam Conference of the International Maritime Committee to replace the York-Antwerp Rules, 1924. These Rules have no application unless they have been expressly incorporated by contract into policies of insurance and charterparties and bills of lading. The most important change introduced by the Rules of 1950 is that effected by the "Rule of Interpretation" which precedes the lettered Rules(21). In *Vlassopoulos* v. *B. & F. M. Insurance Co.*(22) it was held that the lettered and numbered Rules in the Rules of 1924 had to be read as a whole, the lettered Rules enunciating general principles and the numbered Rules dealing with specific cases, and consequently the numbered Rules had no application to cases clearly outside the lettered Rules.

It will not be out of place to state shortly the facts leading to the above decision. A ship was in the port of Bordeaux for loading a cargo. While she was so engaged the foremast broke and fell on to the main deck doing damage, and in consequence of the breakage a derrick, which was attached to the foremast, fell into a hold and was damaged. The

(21) Scrutton, 17th ed., p. 468.
(22) (1929) 1 K.B. 187, 196-8 (per Roche J.).

casualty was an accidental and fortuitous occurrence, and the ship was not in consequence thereof at any time in danger. The ship was then moved into a wet dock for repairs. After being repaired the ship proceeded on her voyage to her destination. While at sea she fouled some submerged wreckage and damaged the blades of her propeller, and was thereby rendered unfit to encounter the ordinary perils of the sea, and accordingly she put into Cherbourg for inspection and repairs, this being necessary for the common safety of the ship, cargo and freight. Both the charterparty and the policy of insurance in respect of the ship provided that average was to be adjusted according to the York-Antwerp Rules, 1924. A dispute arose between the shipowner and the underwriters with regard to liability for certain expenses incurred, and payments made by the owner in the ports of Bordeaux and Cherbourg in connection with the two casualties, *viz.*, wages and provision of master, officer and crew during the time the ship was being repaired; coal consumed in shifting the ship "MAKIS" in and out of dock; handling cargo on board; discharging cargo; towage in and out of port, mooring expenses and port charges. The dispute was referred to arbitration, and the arbitrator held that none of these expenses were the subject of general average contribution, but stated a case for the opinion of the Court.

The "Rule of Interpretation" was added to negative the effect in practice of the judgment of Roche J. in the *Makis Case*(22).

The effect of this Rule of Interpretation may be illustrated by reference to Rule XI(b). Under *The Makis* decision(22) the wages and maintenance of the master, officers and crew during a period of detention in port to repair accidental damage not caused by a general average act were disallowed in general average. Under the Rule of Interpretation they would be allowed since the condition contained in the words "detained..... to enable damage to ship caused by.....accident to be repaired" would be satisfied notwithstanding that the case could not be brought within the principles of the lettered Rules.

Other amendments in detail are made both in the lettered and numbered Rules to meet points of difficulty which have arisen in practice since the Rules of 1924 came into general use and to secure general uniformity of practice(21).

The York-Antwerp Rules, being an international set of rules, drawn up by an international convention, are for that reason not to be presumed to have the same effect as the English common law, and should not be artificially construed in an endeavour to make them conform to the English common law. They do not constitute a complete or self-contained code, and need to be supplemented by bringing into the gaps provisions of the general law which are applicable to the contract. They have not in themselves any legal force. The parties to a contract can, if they so choose, agree that general average shall be payable according to the York-Antwerp Rules. But the parties have freedom of contract: they could agree not to adopt the York-Antwerp Rules or agree to adopt

them with express modifications or agree to adopt them with implied modifications(23).

AVERAGE ADJUSTERS

Any extraordinary expenditure, or any sacrifice of ship, freight, or cargo, intentionally and reasonably made or incurred in a time of peril, in order to secure the common or general safety, gives rise to a claim for general average. In the case of sacrifice, the owners of the property sacrificed have to be compensated in general average, and all such compensation, as well as any expenditure or losses incurred as above, has to be allocated pro-rata on the arrived value of all the property saved by the expenditure or sacrifice. This apportionment is made by a statement or adjustment of general average, and the responsible task of adjustment must be confided only to persons qualified by special training and experience. The appointment of the average adjuster rests primarily with the shipowners. The shipowners, in case of a general average are entitled to require from the consignees of cargo security for the payment which shall eventually be found due from each and this security often takes the form of an average bond. The shipowners may, in addition to requiring consignees' signature to an average bond, demand a cash payment as a deposit in advance, or a guarantee of the Corporation of Lloyd's, or other approved security.

It is usual for underwriters (although not legally liable to do so) to refund to their assured any amounts thus deposited, if Lloyd's or other approved form of deposit receipt is used and the funds have been deposited in trust at a Bank. On completion of the general average statement the underwriters then claim from the shipowners any sum by which the amount deposited may be found to exceed the actual liability. The shipowners require production of the deposit receipt in proof of the claimant's right to a refund. It may be observed that part of the machinery of Lloyd's provides for the collection of refunds on behalf of underwriters and others, and that experience points to the conclusion that deposit receipts should be carefully safeguarded, the issue of duplicates being considered undesirable. Lloyd's form of deposit receipt is a bearer document and does not require endorsement; other forms of receipt must be endorsed by the depositors.

In passing, it may be of interest to refer briefly to the history of Lloyd's and to Lloyd's Policies, Marine or otherwise.

LLOYD'S COFFEE HOUSE

The early London coffee houses were centres not only of commerce and literature, but of debate. They also had a political influence which

(23) *Goulandris* v. *Goldman*, (1957) 3 W.L.R. 596, 605 (per Pearson J.). In this case Pearson J. discussed at length the effect of the provisions of Rule D of the York-Antwerp Rules, 1950, and of Article III, Rule 6, of the Hague Rules.

moved Charles II to attempt unsuccessfully their suppression as "nurseries of sedition and rebellion". Among the innumerable seventeenth century London coffee houses was one called "Lloyd's Coffee House", owned by Edward Lloyd and situated in Tower Street. It had the advantage of being near the River Thames, and thus attracting the patronage of men interested in and connected with the sea, among whom were merchants willing to accept insurance on ships and their cargoes.

In the seventeenth century there were no insurance companies as we know them today. The practice was for individuals, who came to be called Underwriters because they wrote their names beneath the wording on insurance policies, to guarantee commercial ventures on a personal basis. Lloyd's Coffee House proved a favourite venue for them to conduct their business informally over cups of coffee, amid the hum of conversation and the hustle round about. As time went by, Lloyd's Coffee House became generally recognised as a likely place for persons wanting insurance cover to find Underwriters, and Edward Lloyd found that with the reputation came an increased custom that he was not slow to encourage.

Lloyd prompted the trend towards business by providing his customers with pen, ink, paper, and shipping information obtained from the water-front by runners. In 1696 he published a news sheet called "Lloyd's News", but this was discontinued.

The original Lloyd's Coffee House was merely a convenient and apparently congenial place for merchants of common interest to meet, chat, and to transact insurance and other business. When Lloyd died in 1713 it was little more. "From this coffee house coterie there was gradually evolved a great society with world-wide fame, culminating in the Corporation of Lloyd's under the Act of 1871". This Act was amended by Lloyd's Acts of 1911, 1925 and 1951, whereby the objects of the society were extended to meet the requirements of modern developments.

Notwithstanding the change in the venue of Lloyd's with the passage of time, Lloyd's system of individual unlimited liability is still maintained. Thus, when a merchant or a shipowner insures at Lloyd's he places his risk "not with the Society or Corporation of Lloyd's but with one or more Syndicates of Lloyd's Underwriters, and every member of each Syndicate participating in the insurance is directly liable to the policy-holder for his share of any loss which may arise under the policy."

One of the functions of Lloyd's as a Society is to collect and put in circulation reports of accidents and other information of interest to Lloyd's Underwriters and to insurance and shipping communities, one of its publications being "Lloyd's List and Shipping Gazette", which dates back to 1734 and is the oldest London newspaper with an unbroken record of continued existence since then.

LLOYD'S POLICY ETC.

Lloyd's Marine Insurance Policy, originally adopted in 1779, is still commonly used as a standard form with suitable additional clauses to cope with modern needs, and Lloyd's Average Bond and other documents are widely known and in general use.

SECTION 66, INDIAN MARINE INSURANCE ACT, 1963

Section 66 of the Indian Marine Insurance Act of 1963 deals with "general average loss" as follows:—

(*1*) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(*2*) There is a general average act where extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

(*3*) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

(*4*) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him ; and in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

(*5*) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the interest insured, he may recover therefor from the insurer.

(*6*) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against.

(*7*) Where ship, freight and cargo, or any two of these interests, are owned by the same assured the liability of the insurer in respect of general average losses or contributions is to be determined as if those interests were owned by different persons.

The corresponding English section, viz. Section 66, is identical in language with this section, except that in sub-section (5) of the English section the word "subject" is used instead of the word "interest" as used here.

GENERAL AVERAGE LOSS

According to sub-section (1) of Section 66 of the Indian Act, a general

average loss includes (A) sacrifices, and (B) expenditure, of which the following are examples:

(A) SACRIFICES

I.—Cargo and Freight

Loss due to the following causes is admissible in general average:—

(*a*) Jettison from under deck.

(*b*) Jettison from on deck when it can be shown that it is the recognised custom of the trade in which the vessel is at the time engaged to carry deck cargo.*

(*c*) Water or other means used to extinguish a fire on board ship.
Packages which have been on fire do not receive any allowance in general average, although they may also have been damaged by the means used to extinguish the fire.

(*d*) Discharge and re-shipment for the purpose of floating a vessel when stranded and in a position of peril.

II.—Ship's Materials

(*1*) Masts, spars, sails or rigging cut away for the common safety;

(*2*) Chains and anchors shipped to avert a threatening peril;

(*3*) Damage to a vessel's machinery, ropes, winches, windlass and other gear incurred in the endeavour to float a stranded ship when in a position of peril;

(*4*) Damage done in the efforts to extinguish a fire on board or in the process of jettisoning cargo.

(B) EXPENDITURE

(*i*) Expenses incurred in floating a stranded ship if in peril;

(*ii*) Inward expenses of entering a port of refuge to repair damage to ship;

(*iii*) Cost of discharging cargo at a port of refuge for the purpose of repairing damage to ship;

(*iv*) Cost of warehousing, warehouse rent on cargo, reshipment of cargo and outward expenses of leaving the port of refuge, but only when the cause of the vessel putting into port has been to repair damage which is itself the consequence of a general average act.

But the subject of general average is in a somewhat unsatisfactory condition. The liability to contribute is a common law liability, independent of insurance, and consequently the liability of the assured under the contract of affreightment may differ from that of the insurer under the policy. For example, suppose goods are insured with a warranty free from capture and seizure. General average expenses may be incurred in avoiding capture, but the insurer would not be liable for them. The

*Jettison made in a time of common peril seems first mentioned in *Mouse's Case*, (1609) 12 Coke Rep. 63.

English rule of law, though not always logically carried out in details, is narrower than the consistent practice of average adjusters, and considerably narrower than the rule which prevails in nearly all foreign countries. In England, general average is only payable when the sacrifice was made, or the expenditure incurred, for the preservation of the ship and cargo. Foreign laws for the most part include in the general average nearly all expenses incurred for the benefit of the common adventure. In practice, the normal English rule only applies in exceptional cases, because nearly every policy contains a foreign adjustment clause which makes either some foreign law or the York-Antwerp Rules applicable. The usual clause runs as follows:—

"General average and salvage charges payable according to foreign statement, if so made up, or per York-Antwerp Rules if in accordance with the contract of affreightment."

PARTICULAR CHARGES

SECTION 64, INDIAN MARINE INSURANCE ACT, 1963

Now, "particular charges" are not identical with, or included in, "particular average loss". Section 64 of the Indian Act, which defines "particular average loss" and "particular charges" makes this clear, and is to the following effect:

(*1*) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against and which is not a general average loss.

(*2*) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.

The language used in the corresponding section of the English Act, *viz.*, Section 64, is identical with the language used here.

MASTER'S DUTY TO COLLECT GENERAL AVERAGE CONTRIBUTION

Where a general average loss has occurred on a voyage, the shipowner or master has the right to retain the cargo until he is paid or tendered the amount due on it for general average ; he is under a duty to persons entitled to a general average contribution from the cargo to take all reasonable precautions to protect their interests either by obtaining deposits in cash or suitable bonds and guarantees, and is liable to an action if he omits to do so. It is also the duty of the master to furnish to all cargo-owners all the accounts and particulars necessary for adjusting general average. If he omits to do so, the cargo-owner who fails to tender a sufficient sum in consequence of such omission, it not liable for such failure.

If he does furnish such particulars, the cargo-owner must either pay the sum demanded, or tender the right sum, at his peril.

If, as in practice, the master demands a particular security for the

payment by the cargo-owner of the amount found on adjustment to be due, such security must be a reasonable one(24).

SALVAGE

If cargo is saved from loss or damage on a voyage by persons other than those who have undertaken to carry it, the salvors are entitled to remuneration for their services, known as "salvage". No salvage is payable by cargo owners unless some cargo is saved, and it is payable proportionately to the cargo saved. Ship and cargo must each pay its own share of salvage; neither can be made liable for salvage due from the other without an express agreement to pay it, or unless the ship-owner is liable to indemnify the cargo-owners for such payment(25).

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(24) Scrutton, 17th ed., pp. 286-7.
(25) *Ibid.*, pp. 289-290.

LECTURE VII

PERFORMANCE OF CONTRACT

RIGHT OF NAMING DISCHARGING BERTH

The topic of unloading has to be considered next. Now, at the port of discharge it is the duty of the master to proceed to the place of discharge provided by the contract of affreightment, and the shipowner may be restrained by injunction from discharging cargo in a place not so agreed. In the case of a general ship the right of naming the discharging berth is vested in the master, subject to any controlling custom of the port. But where a ship is under charter this right belongs—

(*1*) if the charterers hold the bills of lading, to the charterers ;

(*2*) if the bills of lading are not held by the charterers, to the bills of lading holders, if all agree on the place of discharge, or to the majority of the bills of lading holders so long at any rate as the minority do not dissent ;

(*3*) if there is no agreement, to the charterers or possibly to the bills of lading holders with the preponderating interest.

Apart from special provisions, it is the duty of the shipowner at common law to get the goods out of the ship's hold and put them on the ship's deck or alongside ; but the duty of providing, and making proper use of, sufficient means for the discharge of the cargo, when it has been got up out of the hold, lies in general upon the charterer(1).

Now, it is well known that a "ship's papers" include—

(*1*) the bill of health,
(*2*) the manifest,
(*3*) the charterparty or bills of lading,
(*4*) the official log, and
(*5*) the list of dutiable stores.

On arrival at the port the master presents the bill of health to the medical officer of the port, who after satisfying himself that there is no objection to the ship—on the ground of health—passes it in as "clean".

The Rummaging Officer or Excise Officer comes on board and compares the list of stores with the amount in the ship's pantry, which is thereafter sealed and remains so sealed whilst in port. He then searches for contraband goods, if any, which may be on board.

After delivery of the manifest etc. and observance of certain formalities and payments of certain dues the bulk is allowed to be broken, *i.e.*, hatches are allowed to be opened and the cargo is permitted to be removed from the ship.

(1) Scrutton, 17th ed., p. 293.

Necessarily the procedure is reversed when the ship is departing from the port, as will be seen, for instance, from relevant sections of the Sea Customs Act of 1878 and of the Customs Act of 1962.

If the ship is delayed by reason of the charterer's failure to name a port, the charterer will be liable in damages. And if, by refusing to name a place of discharge, he prevents the shipowner from earning the freight, he will have to pay it as damages for breach of contract(2).

"SAFE PORT" MUST BE SPECIFIED

But the port specified by the charterer must be "safe". It will be useful to remember that a *"safe port"* means "a port to which a vessel can get laden as she is and at which she can lay and discharge, always afloat". Moreover, it must be a port from which she can safely return. If a port is in fact unsafe, it is irrelevant that well-informed men might erroneously have pronounced it to be safe. The port must be safe for the particular vessel carrying the cargo she has on board. And it must be politically as well as physically safe, this being a question of fact in each case ; e.g. the shipowner is not bound to risk confiscation by entering a port which has been declared closed. Again, if the named port is one at which no tugs are ever obtainable, and the chartered vessel cannot, by reason of her size, reach that port without the assistance of tugs, that port is not safe. If the ship with all her cargo cannot safely get into the place named, the ship-owner is entitled to unload at the nearest safe place. He is not bound by a custom to unload partly outside and partly inside the port. A temporary condition of danger, however, will not make the port unsafe, provided that such condition will not last an unreasonable time. The effect of the addition of the clause *"or so near thereto as she may safely get"* after the name of the port of discharge is to limit what would otherwise be an absolute obligation on the ship-owner to enter the port named in spite of sand, bars, ice, blockade, etc. The clause is also used even where the port is not named in the charter-party. The clause relates only to obstacles which are regarded as permanent, not to such as were contemplated as ordinary incidents of the voyage. A temporary obstacle, such as an unfavourable state of the tide or insufficient water to enable the ship to get into dock, will not make the place unsafe so as to discharge the shipowner from liability to unload there, unless the terms of the contract indicate otherwise. Many modern ships would be injured by taking the ground, and these words serve to limit the shipowner's obligation. Thus, where the bill of lading contained these words and the ship could not discharge at the port named without taking the ground, it was held that the master was entitled to unload at the nearest safe place. But this clause will not allow the shipowner to refuse to draw into a berth where the ship cannot lie continually afloat, if she can do so for a certain time. Even where the charterer nominates an *"unsafe port"*, if the master has acted unreasonably, *e*.g.,

(2) *Stewart* v. *Rogerson*, (1871) L.R. 6 C.P. 424.

knowing of the danger in the port, has still proceeded to enter it and damage results, the charterer will not be responsible. The same principle applies in the case of time charterparties(3).

NOTICE OF READINESS TO DISCHARGE NOT REQUIRED

When the ship has arrived at the place of discharge, the consignee or endorsee of the bill of lading must take steps to receive the goods. In the absence of a custom or special contract to the contrary, the shipowner is not bound to notify the consignees that he is ready to unload, though, if he is intending to have recourse to the clause *"or so near thereto as she may safely get"*, he must inform them of the place to which he intends to proceed. In general, however, it is the duty of the holders of the bills of lading to look out for the arrival of the ship. The reason for this rule is that the bills of lading may have been assigned during the voyage, and the master may not know who is entitled to the goods. But where the consignee's ignorance of the ship's arrival is due to some default on the part of the shipowner, such as entering the ship at the customs-house under a wrong or misleading name, he will not be liable for delay occasioned thereby(4).

READINESS TO DISCHARGE, MEANING OF

To be ready to discharge, the ship must not only have reached her destination, she must also have complied with all the legal formalities necessary to enable the discharge to begin. The master must, therefore, have reported the ship and crew, and must have delivered his manifest and other papers to the proper officers. This rule does not, however, apply where the port authorities have already given the ship permission to begin the discharge of her cargo, and the consignee must then be prepared to take delivery at once. Readiness to discharge means readiness in relation to the cargo of the particular consignee concerned ; thus, a ship is not in a state of readiness to discharge a particular cargo if she must first discharge overstowed cargo in order to get access to the particular cargo(5).

The principle that a vessel is not ready to load until she is discharged in all her holds so as to give the charterer complete control of every part of the vessel available for cargo applies also to the discharge of a ship(6).

PERSON TO WHOM DELIVERY SHOULD BE MADE

The person who is entitled to claim delivery of the cargo is the holder of the bill of lading, whether as consignee named in it or as assignee of it under a valid endorsement. If the shipowner delivers the

(3) Payne, 8th ed., pp. 93-96.
(4) *Ibid.*, pp. 96-97.
(5) Halsbury's *Laws of England*, Simonds ed., Vol. XXXV, para. 635.
(6) *Government of Ceylon* v. *Societe Franco-Tunisienne d' Armement-Tunis*, (1962) 2 Q.B. 416.

cargo to a person who is not entitled to it without production of the bill of lading, he is responsible to the true owner for the value of the cargo. He is not, however, bound to make delivery unless the bill of lading is produced, and any existing liens over the cargo are satisfied. At the same time, he may not claim damages for the detention of the ship by reason only of the failure of the consignee to present the bill of lading if it is reasonably practicable to land the cargo and reserve his lien, or, if a sufficient indemnity is offered by the consignee(7).

PERSONAL DELIVERY

Bourne v. *Gatliff*

The goods must be handed over to the consignee or his agents. Thus, in *Bourne* v. *Gatliff*(8), goods were consigned under a bill of lading to the plaintiff or his assigns. They were discharged at a wharf on the day after the ship's arrival. The consignees were not aware of the ship's arrival, and they were not at the wharf to take delivery. Within twenty-four hours of the discharge the goods were accidentally destroyed by fire. The jury found that delivery at the wharf did not constitute proper delivery by reason of any special custom of the port. It was held that the shipowner was liable for their value. A reasonable time must be allowed for claiming the goods, and, until that time has elapsed, the shipowner's liability as a carrier continues. "The contract was to deliver to the consignee in the port of London; instead of a delivery to the consignee, the goods were placed on Fenning's wharf".

CUSTOM OF THE PORT OF DELIVERY, OR STATUTORY PROVISIONS, OR EXPRESS CONTRACT, REQUIRING OTHER MODE OF DELIVERY

But personal delivery is not required where the custom of the port recognises another mode of delivery. Thus, in London delivery to the dock authority is, as regards the ship's liability, equivalent to delivery to the consignee(9). Again, personal delivery may not be required by statute. Thus, Sections 90 and 91 of the Calcutta Port Act, 1890, enact, inter alia, that the Commissioners for the Port of Calcutta shall, by their servants or agents, land all goods from any sea-going vessel coming to their docks, wharves, quays, stages, jetties or piers, and give, if required, to the person in charge of such vessel a receipt in respect of all goods landed from such vessel during one day, and that no person to whom such receipt shall have been so given, nor the master nor owner of the vessel from which the goods in respect of which such receipt shall be given may have been landed, shall be liable for any loss or damage to

(7) Halsbury's *Laws*, Vol. XXXV, para. 637.

(8) (1844) 7 M. & G. 850, 865 (per Lord Lyndhurst).

(9) *Petrocochino* v. *Bott*, (1874) L.R. 9 C.P. 355. The expression "custom of the port" does not mean custom in the sense in which the word is sometimes used by lawyers, but means "a settled and established practice of the port" (*Postle-thwaite* v. *Freeland*, 1881 App. Cas. 599, 616).

such goods which may occur after they shall have been so landed. Similar provisions are to be found in statutes relating to the other major Indian ports, so that in the case of all major Indian ports the shipowner is excused by statute from liability to make personal delivery*.

Chartered Bank of India v. *B.I.S.N. Co.*

By express contract also personal delivery may be excused. Thus, in a case before the Privy Council goods were shipped to Penang to be delivered there "to order or assigns" under bills of lading which contained the condition that "in all cases and under all circumstances the liability of the Company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee". The landing agents appointed by the defendants fraudulently delivered the goods to persons other than the consignees. It was held that, although there had been no delivery under the bill of lading, the above clause was operative and effectual to protect the shipowner(10).

Sze Hai Tong Bank v. *Rambler Cycle Co.*

However, in 1959 there came up again before the Judicial Committee a case(11) where the respondent manufacturer shipped from England to Singapore bicycle parts to the value of about £3,000 under a bill of lading requiring the goods to be delivered "unto order or his or their assigns," and which, by clause 2, provided that "(c).....the responsibility of the carrier.....shall be deemed.....to cease absolutely after the goods are discharged" from the ship.

After the goods had been discharged in Singapore the carrier's authorised agent, in accordance with what was alleged to be the common practice there, released them to the consignee against a written indemnity by the latter's bank in favour of the carrier, but without production of the bill of lading. The consignee never paid for the goods, and on a claim by the respondent against the carrier for damages for breach of contract or for conversion the latter brought in the consignee and the indemnifying bank as third parties, claiming to be entitled to be indemnified by them. The bank—the appellant before the Privy Council—admitted liability to indemnify the carrier if the latter were held liable. It was held, that a shipowner who delivers without production of the bill of lading does so at his peril. In delivering the goods, without production of the bill of lading, to a person who, to its knowledge, was other than one entitled under the bill of lading to receive them, the carrier was liable for breach of contract and for conversion, and was not protected by the exception clause 2(c). The extreme width of that clause must be cut down by an implied limitation ; it must be

**Trustees, Port of Madras* v. *P.V.S.M. Rowther*, (1963) Supp. 2 S.C.R. 915.
(10) *Chartered Bank of India* v. *B.I.S.N. Co.*, (1909) A.C. 369.
(11) *Sze Hai Tong Bank* v. *Rambler Cycle Co.*, (1959) A.C. 576.

limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract, and at least so as not to permit the carrier deliberately to disregard its obligation as to delivery to deliver against production of the bill of lading.

In the last-mentioned case Lord Denning said at p. 588:

"The appellants placed much reliance, however, on a case which came before their Lordships' Board in 1909, *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Co. Ltd.*(10). There was there a clause which said that 'in all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle.' The goods were discharged at Penang and placed in a shed on the jetty. Whilst there a servant of the landing agents fraudulently misappropriated them in collusion with the consignees. Their Lordships' Board held that the shipping company were protected by the clause from any liability.

"Their Lordships are of opinion that that case is readily distinguishable from the present, as the courts below distinguished it, on the simple ground that the action of the fraudulent servant there could in no wise be imputed to the shipping company. His act was not its act. His state of mind was not its state of mind. It is true that, in the absence of an exemption clause, the shipping company might have been held liable for his fraud, see *United Africa Co. Ltd.* v. *Saka Owoade*(12). But that would have been solely a vicarious liability. Whereas in the present case the action of the shipping agents at Singapore can properly be treated as the action of the shipping company itself."

CESSATION OF SHIPOWNER'S RESPONSIBILITY

The shipowner continues liable as a carrier until by the contract, or in the usual course of business, the transit is terminated and the goods have been warehoused for their owner until he is ready to receive them. The mere fact that the goods have reached their destination is not enough to discharge the shipowner. The carrier may limit his liability to that of a bailee by giving notice that he has warehoused the goods and will no longer be responsible for their safe custody, provided the consignee accepts such notice. The consignee's refusal to take delivery, or failure to do so within a reasonable time, also puts an end to the shipowner's liability as a carrier. And when the shipowner has warehoused the goods under the provisions of the Merchant Shipping Acts he is no longer responsible for their safety. The warehouseman is not an agent for the shipowner for the purpose of ensuring the safety of the goods. He is under an obligation to deliver the goods to the same person as the shipowner was by his contract bound to deliver them, and is justified or

(12) (1955) A.C. 130.

excused by the same circumstances as would justify or excuse the master(13).

DELIVERY OF MIXED GOODS

The duty of the shipowner is to deliver to each consignee the goods entrusted to the shipowner for carriage to him. But where different kinds of goods have been shipped in bulk, as one parcel, the consignee cannot require the shipowner to separate them before delivering. A question of difficulty sometimes arises in delivering goods owing to their identity having been lost. This may happen where goods of the same kind belonging to several different owners are carried together, and the marks on some of them become obliterated ; or where, being carried in bulk, the separations between them are broken up ; or where packages containing the goods are burst, so that the different bulks, or parts of them, become mixed together. In such cases the rule adopted is that the several owners become tenants in common in the confused or mixed goods, in proportion to the quantities which should have been delivered to them respectively. And a division of the goods, or their proceeds, on that basis should be made(14). But the provisions of the bills of lading or the custom of the port of delivery may relieve the shipowner of this duty(15).

Grange v. *Taylor*

In *Grange* v. *Taylor* several bills of lading had been given for undivided portions of a large bulk of maize. During the discharge it was found that part of the bulk was damaged. This was after the holder of one of the bills of lading had received his quantity, all sound ; and the question arose as to the shipowner's obligation to apportion the damage. The bulk had been shipped by one shipper and each of the bills of lading contained the clause: "Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage".

Bigham J. held that this did not put upon the shipowner an obligation to apportion the sound and damaged among the bill of lading holders. After referring to the similar clause in the London Corn Trade Association's form of sale contract (under which the separate portions of the maize had been sold), he said "When the bill of lading is read by the light of these facts, the meaning and object of the clause in question becomes quite plain. It is put there for the purpose of regulating the rights of the holders of the different bills of lading, inter se, and is not intended to increase the shipowner's duty at all."

Peninsular & Oriental Co. v. *Leetham*

In *Peninsular & Oriental Co.* v. *Leetham*(16) wheat was shipped in bags

(13) Payne, 8th ed., p. 101-102.
(14) *Spence* v. *Union Marine Insurance Co.*, (1868) L.R. 3 C.P. 427.
(15) *Grange* v. *Taylor*, (1904) 9 Com. Cas. 223.
(16) (1915) 32 T.L.R. 153.

from Australian ports by several consignors to several consignees in parcels. On arrival in Hull a quantity of wheat was found to have escaped from broken or leaky bags and could not be identified as having come from any particular parcel. The shipowners delivered the loose wheat to consignees proportionately, and, as a result, consignee A received five tons short and consignee B received five tons in excess of their proper respective quantities. A custom of the Port of Hull for such delivery to be made in such circumstances was proved. The Divisional Court (Avory and Lush JJ.) held that the custom was valid in law and that the shipowners were not liable to A in respect of the short delivery, and that, in the circumstances, B was obliged under an implied contract to redeliver the surplus of five tons received by him to A.

Where the cause of the mishap was not an excepted peril, the shipowner is liable to any particular bill of lading holder, and the mere delivery of a portion of the mixed goods will not relieve him of it, though, of course, a special provision in the bills of lading might do so if its terms were wide enough.

Sandeman v. *Tyzack etc. Co.*

In the leading case of *Sandeman* v. *Tyzack, etc., Co.*(17) bales of jute were consigned to various persons. The bills of lading provided that the number of packages signed for should be binding on the shipowner. The bales were specifically marked but the shipowner was exempted from liability for obliteration or absence of marks. When the cargo was unloaded, fourteen bales were missing and eleven others could not be identified as belonging to any particular consignment. All but four of the consignees received the full number of bales, and the shipowner claimed to apportion the eleven bales among these four. It was held that, as the shipowner had failed to deliver the full number of bales shipped, he was not entitled to claim the benefit of the exemption as to obliteration of marks ; and he was liable for the full value of the missing bales and of those which could not be identified.

MASTER'S POWER TO LAND AND WAREHOUSE CARGO

The master may, if he thinks fit, keep the cargo on board for a reasonable time before landing it ; and, provided that he has acted reasonably, he is not precluded from claiming demurrage by the fact that he might without any breach of duty, have landed the cargo sooner. Where the contract is silent on the matter and there is no custom applicable to the case, the master is not entitled to land the cargo at once ; he must retain it on board for a reasonable period to give the consignee every opportunity of taking delivery. Moreover, he has the right to retain the cargo on board as long as may be reasonably necessary for his protection. It is his duty, however, to deal with the cargo in a reasonable manner, having regard to his lien for freight, and though he may retain the cargo on

(17) (1913) A.C. 680.

demurrage, he must not act vexatiously in so doing, or detain the ship beyond a reasonable time. He is, therefore, allowed to take a different course, and he may land and warehouse the cargo upon giving notice to the consignee that the cargo is at his disposal on payment of the freight. However, if it is impossible for him to land the cargo, either because there is no warehouse accommodation or because the landing is prohibited, he may take any other reasonable course that may be open to him, and if the most prudent course is to bring the cargo back to the port of loading he is entitled to do so, and may in that case claim freight in respect of both the outward and the homeward voyage(18).

LIABILITY OF SHIPOWNER IN ABSENCE OF EXPRESS STIPULATIONS

In the absence of express stipulations in the contract of affreightment, and subject to certain statutory exemptions from, and limitations of, liability, all shipowners who are common carriers for reward (i.e., who offer their ships as general ships for the transit of the goods of any shipper) are liable for any loss of or damage to such goods in transit, unless caused by the act of God, or public enemies, or by the inherent nature of the goods themselves, or by their having been properly made the subject of a general average sacrifice(19).

OPERATION OF EXCEPTIONS

Exceptions in the contract of affreightment, unless otherwise clearly worded, limit the shipowner's liability during the whole time he is in possession of the goods as carrier and therefore apply during the loading and discharging of the goods. The prohibition of exceptions (other than those contained in Article IV of its Schedule) by the Carriage of Goods by Sea Act, 1924, applies to the period *"from the time when the goods are loaded on to the time when they are discharged from the ship."* As regards his liability for the goods before or after this period, the Act by Article VII permits the shipowner freedom of contract(20). The same remarks will apply to the identical provisions of the Schedule to the Indian Carriage of Goods by Sea Act, 1925.

PERSONS WHO CAN SUE FOR FAILURE TO CARRY GOODS SAFELY

The following persons can sue for failure to carry goods safely:

A. In tort, there can sue:

All who have any proprietary interest in the goods, whether or not they are parties to the bill of lading.

The consignee of goods will be deemed to have such a property unless the contrary appear.

The nominal shipper cannot sue in tort if he ships merely as agent for the real owner.

(18) Halsbury, Vol. XXXV, para. 656.
(19) Scrutton, 17th ed., p. 201.
(20) *Ibid*, pp. 248-9.

Persons having a merely equitable or contractual right or licence to the possession of goods cannot sue in conversion.

B. In contract, there can sue:

(*1*) The shipper, unless he acted merely as agent for another, in which case the principal can sue and the agent cannot, except where he makes a special contract in his own name with the shipowner.

(*2*) Any person to whom by indorsement and delivery of the bill of lading, or by indorsement followed by delivery of the goods, the absolute property in the goods has passed.

(*3*) The consignee named in the bill of lading if the property has passed to him by such consignment(21).

PERSONS WHO CAN BE SUED FOR NEGLIGENT CARRIAGE OF GOODS

The following persons can be sued for negligent carriage of goods:

A. The shipowner. (*1*) In tort, if he is or was in possession of the goods by his agents, there being no charter amounting to a demise: (*2*) in contract, by any person with whom he has contracted, or by the assignees of such person.

B. The charterer. (*1*) In tort, if he is or was in possession of the goods, his charter amounting to a demise; (*2*) in contract, by any person with whom he has contracted, or the assignees of such person.

C. The master. (*1*) In tort, if he is or was in possession of the goods or the goods were lost or damaged by his negligence; (*2*) in contract, by any person to whom he has made himself personally liable on a contract.

D. Members of the crew, if they have negligently handled or cared for the goods and thus caused loss or damage.

The shipper or person entitled to sue in contract can sue either the master, or the owner or charterer, but not both. If he has obtained judgment against the master, he cannot further sue the owner or charterer for the same cause(22).

VENDOR'S RIGHT OF STOPPAGE *in transitu*

A vendor who has shipped goods, and parted with the bill of lading has still a right, if he remains unpaid, to regain possession of the goods while they are in transit, in the event of the buyer becoming insolvent. This is called the right of stoppage *in transitu,* and it is exercised by giving notice of the claim to those who have custody of the goods, before the transit comes to an end.

PROVISIONS OF INDIAN SALE OF GOODS ACT, 1930, ABOUT STOPPAGE *in transitu*

The relevant provisions of the Indian Sale of Goods Act, 1930, about stoppage *in transitu* viz. Sections 50, 51 and 52, which are based on,

(21) *Ibid*, pp. 250-1.
(22) *Ibid*, pp. 251-2.

and almost identical with, Sections 44, 45 and 46 respectively of the English Sale of Goods Act, 1893, are as follows:—

"50. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller, who has parted with the possession of the goods, has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

"51. (*1*) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

(*2*) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(*3*) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledge to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(*4*) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(*5*) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(*6*) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(*7*) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

"52. (*1*) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(*2*) When notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall re-deliver

the goods to, or according to the directions of the seller. The expenses of such re-delivery shall be borne by the seller."

VENDOR'S OBLIGATION TO ACCEPT DELIVERY

Booth S. S. Co. v. *Cargo Fleet Iron Co.*

The precise rights and duties of the carrier on the exercise by the seller of his right of stoppage in transit were the subject-matter of consideration in *Booth S. S. Co.* v. *Cargo Fleet Iron Co.*(23). In that case the sellers of goods delivered them to shipowners. By the contract of affreightment, made between the shipowners and the buyers, freight was payable in advance, the owners having a lien for unpaid freight, and the goods were to be carried from United Kingdom to Tutoya, Brazil, and there transhipped into lighters and carried up a river to Paranahyba, their destination. The sellers gave notice to the shipowners of stoppage *in transitu* before the ocean vessel reached Tutoya, but refused to give the owners further instructions. The owners therefore landed the goods at Tutoya. No freight had been paid. The shipowners claimed the contract freight, or an equivalent amount of damages, from the sellers. It was held that the sellers were liable in damages for breach of an obligation on them, created by the stoppage notice, to take delivery of the goods and discharge the shipowner's lien for freight, and that the shipowners were entitled to the amount of that freight by way of damages. It was further held that as the sellers had failed to provide duty payable at Tutoya they thereby prevented completion of the contract, and that the shipowners were, in those circumstances, entitled to treat the voyage as completed and recover, as damages, the full amount of the freight.

In the course of delivering judgment in that case Scrutton J. made the following observations(24):—

> "The unpaid vendor may 'stop', that is, retake possession by the carriers holding for him *in transitu*, that is, during the transit; but he cannot, in my view, demand actual possession during the transit against the will of the carrier, or direct the shipowner to deliver to him except at the contractual place of destination. The goods may be under other goods in the hold; the ship may have contractual engagements to carry other goods to other ports; policies of insurance may be affected by detention or delay. The contract of sale is not cancelled by stoppage *in transitu*; neither, in my view, is the contract of affreightment, except in so far as delivery at the port of destination to the consignee is stopped by the unpaid vendor, and other delivery there is ordered by him. The goods then arrive at the contract place of delivery where, if there had been no stop, they would have been delivered to the consignee, subject to the shipowner's lien for freight

(23) (1916) 2 K.B. 570. The history of the right of stoppage *in transitu* may be consulted in Lord Abinger's judgment in *Gibson* v. *Carruthers*, (1841) 8 M. & W. 321, 337.

(24) *Ibid*, pp. 600-3.

.....What is he to do with the goods? Is his ship to go sailing round the world, like the 'Flying Dutchman', on an endless, hopeless voyage for ever carrying goods that no one will take?.....Surely it is for the person who stops the transit and desires to exercise his lien to take the goods and exercise his lien for himself. And must he not, before he does so, satisfy any liens already existing? Further, in my view, the shipowner has fulfilled his contract when he has reached a point where the consignee or person taking delivery is bound to do something, and is not bound himself to incur further expense when no one will take delivery. He is not bound to go into a dock and incur dock dues if he is told that the consignee will not take delivery even if he goes in.....The question is what the shipowners have lost by the vendors' refusing to take delivery at the end of the transit when they have stopped the contractual delivery. And if, as I have held, they were bound to take delivery in such a case, the shipowners have lost at least the amount of the freight which the vendors must have paid before they took delivery. It is not necessary to hold that the vendors become a party to the original contract; their obligation follows, in my view, from their interfering with the contract and persisting in their interference at the end of the transit."

MEASURE OF DAMAGES

Hadley v. *Baxendale*

In the leading case of *Hadley* v. *Baxendale*(25) Baron Alderson observed: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be, either such as may fairly and reasonably be considered arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

The principles enunciated above have been applied to breaches of contracts for the carriage of goods by sea. Thus, where goods are lost or damaged, the value of the goods for which compensation must be made, shall ordinarily be that which they would have had at the time and place at which they ought to have been delivered in proper condition(26). Where goods are delivered short of their destination, the merchant should arrange for the carriage forward and charge the shipowner with the reasonable cost of doing so(27). Where there has been delay in carrying goods, the measure of damages is generally the difference between the market value of the goods at the time when they ought to

(25) (1854) 9 Exch. 341, 354.
(26) *The Arpad*, (1934) p. 189.
(27) *Monarch S. S. Co.* v. *Karlshamns*, (1944) A.C. 196.

have been delivered and the time when they were in fact delivered(28). Courts are slow to allow loss of profits as an item of damage in case of delay in delivery, and the reason is not far to seek. For the carrier commonly knows little about the purposes for which the consignee needs the goods or about other special circumstances which may cause exceptional loss if due delivery is withheld.

As devaluation of currency is a common feature now, it may be noted that changes in the relative value of currencies are irrelevant if they occur after the date at which damages fall to be assessed and are usually to be disregarded if they occur on or before that date, either because the loss flowing from the revaluation has no causal connection with the breach of contract or because such a loss is not within the assumed contemplation of the parties(29).

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(28) *Dunn* v. *Bucknall Brothers*, (1902) 2 K.B. 614.
(29) *Aruna Mills Ltd.* v. *Dhanrajmal*, (1968) 2 W.L.R. 101. See also *The Abadesa*, (1968) 3 W.L.R. 492 and *The Mecca*, (1968) 3 W.L.R. 497.

LECTURE VIII

FREIGHT

"FREIGHT", MEANING OF

"Freight", in the ordinary mercantile sense, is the reward payable to the carrier for the carriage and arrival of the goods in a merchantable condition, ready to be delivered to the merchant. The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed, or, if not, whether its performance has been prevented by the act of the cargo-owner. Under a simple contract to pay freight no freight is payable if the goods are lost on the voyage, or for any other reason, except the fault of the merchant alone, are not delivered at the port of destination. From the signing and delivery of bills of lading while the goods are in course of carriage without unreasonable delay, and until they are delivered to the merchant, the master of the ship has a lien on them for the freight due for such carriage, and cannot be compelled to part with them till such freight is paid and the bills of lading delivered up. These incidents of freight exist by rule of law, and do not need a bill of lading or other written contract between the parties to support them, though they may be excluded by such a written contract. The term "freight" will be presumed to have its ordinary mercantile meaning, unless evidence is found in the charter or bills of lading which negatives this. But where the contract sued upon is an oral contract, evidence may be given that the parties by using the term "freight" intended "advance freight"(1).

Freight on bill of lading shipments is calculated in three ways, weight of cargo, measurement of cargo, or, when the value is high, at ad valorem freight, the latter being chargeable at so much per cent on the declared value of the goods.

Charterparty freight is fixed at an agreed rate for so much per ton (1,015 or 1,016 kilos) or other trade measure. Here there is no stipulation for weight or measurement cargo.

DIFFERENT TYPES OF FREIGHT

When there is no provision to the contrary, freight is payable on the delivery of the goods, and is calculated on the amount actually delivered. Sometimes, however, the parties agree that a lump sum freight shall be paid irrespective of the amount of cargo carried. A frequent provision is that freight is to be paid in advance. In certain cases a pro rata freight is payable. If the consignee does not take delivery of the goods,

(1) Scrutton, 17th ed., pp. 330-1.

the shipowner may be entitled to a back freight. If the charterer does not load a full cargo, damages for dead freight may be claimed.

(1) FREIGHT PAYABLE ON DELIVERY OF GOODS

Asfar v. *Blundell*

It is a condition precedent of the shipowner's right to recover freight that the service in respect of which the freight was contracted to be paid has been substantially performed. The shipowner is entitled to full freight if he is ready to deliver at the port of destination the goods loaded. The charterer or consignee, as the case may be, cannot deduct from the freight the damage to the goods, but will have a separate cause of action for it, unless it was caused solely by excepted perils, whether excepted by express stipulation or by the operation of the common law(2). And freight will not be payable unless the goods are delivered in such a condition that they are substantially and in a mercantile sense the same goods as those shipped. Thus, in *Asfar* v. *Blundell*, a ship carrying dates was sunk in the Thames. The dates were recovered, but in a state which rendered them unfit for human food. They were sold for distilling purposes. It was held that no freight was payable, because the goods delivered were, for business purposes, something different from those shipped(3).

Although the excepted perils afford the shipowner a good excuse for non-delivery of the goods, he cannot earn freight by virtue of any of them. If the ship cannot finish the voyage, the shipowner must forward the goods by some other means; otherwise his claim to freight is lost. So, where in a charterparty freight was to be paid at so much per ton "*on a right and true delivery of the homeward-bound cargo*" from Honduras Bay to London, and the ship and cargo, after capture and recapture, having been wrecked at St. Kitt's, into which they were carried by the recaptors, a sale of the cargo was directed by the Vice Admiralty Court there on the master's application but without orders from the cargo-owner, and upon sale and after paying claims for salvage, the master claimed to retain for freight the balance of the proceeds of sale, it was held that no freight was payable. Lord Ellenborough C.J., in delivering judgment, said :

> "The shipowners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas or other unavoidable casualties; and the freighter undertakes that if the goods be delivered at the place of their destination he will pay the stipulated freight but it was only in that event, viz., of their delivery at the place of destination, that he, the freighter, engages to pay anything. If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right

(2) *Dakin* v. *Oxley*, (1864) 10 L.T. 268.
(3) *Asfar* v. *Blundell*, (1896) 1 Q.B. 123.

to any freight if they are not so forwarded, unless the forwarding of them be dispensed with, or unless there be some new bargain upon this subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything(4)."

But full freight is payable where the shipowner is prevented from carrying the goods to their destination solely by reason of the act or default of the cargo-owner. Thus, where the shipowner had not abandoned his intention of completing the voyage, but had been prevented from doing so by an order of Court occasioned by the default of the cargo-owner, it was held that he was entitled to the freight(5).

If the goods are brought safely to their destination and delivered there, the shipowner will be entitled to a reasonable remuneration, even if the vessel unjustifiably deviates from the contractual route(6) or is prevented from adopting it by circumstances like the closure of the Suez Canal(7).

(2) LUMP SUM FREIGHT

To earn lump sum freight, either the ship must complete the voyage, or else the cargo must be transhipped, or forwarded by some means other than the ship in which it was originally loaded, and delivered by the shipowner or his agents at its destination(8). Even where some of the goods are lost through causes other than excepted perils, but the ship arrives at her destination, the shipper will have to pay full lump sum freight(9). And the cargo delivered need not be that which was agreed upon in the charterparty, for a different cargo may, in fact, have been loaded(10).

Thomas v. *Harrowing S. S. Co.*

In *Thomas* v. *Harrowing S. S. Co.*(8) the vessel proceeded to the port of discharge, but was wrecked outside that port by perils of the seas, and became a total loss. A substantial part of the cargo (which consisted of pit props) was washed ashore and was afterwards collected on the beach by the direction of the master, the residue of the cargo being lost by perils of the seas. It was held that the lump sum freight, which was payable *"on right delivery of the cargo,"* was recoverable, notwithstanding that the portion of the cargo delivered had been delivered otherwise than by the ship stipulated for. The House of Lords agreed with Pickford J., who tried the case, that what took place was equivalent to transhipment, and that it was immaterial that the wind and the waves played a large part in the process.

(4) *Hunter* v. *Prinsep*, (1808) 10 East 378, 394 (per Lord Ellenborough C.J.).
(5) *Cargo ex Galam*, (1863) Brown & Lush 167.
(6) *Hain S. S. Co.* v. *Tate & Lyle*, (1936) 55 Ll.L.R. 159 H.L.
(7) *Societe Franco-Tunisienne D'Armement Tunis* v. *Sidermar S.P.A.*, (1961) 2 Q.B. 278.
(8) *Thomas* v. *Harrowing S. S. Co.*, (1915) A.C. 58.
(9) *The Norway*, (1865) 13 L.T. 50.
(10) *Ritchie* v. *Atkinson*, (1808) 10 East 295.

(3) ADVANCE FREIGHT

Where money is to be paid by the shipper to the shipowner before the delivery of the goods for ship's disbursements or otherwise, such payment will be treated as an advance of freight or as a loan according to the intention of the parties, as expressed in the document. A stipulation that it shall be paid *"subject to insurance"*, or *"less insurance,"* will indicate that the payment is an advance of freight. If it is an advance of freight, as where the shipper bears the insurance, it must be paid, though the goods are, after the due date of payment, but before payment, lost by excepted perils, and it will not be recoverable from the shipowner if the goods are after payment so lost. It will be recoverable if the shipowner has not fulfilled the condition precedent of starting the carriage of the goods on the agreed voyage in a seaworthy ship within a reasonable time. It will also be recoverable as part of the damages for non-delivery of the goods if they are lost by a peril not excepted(11).

If advance freight be not paid at the time specified, there will not be lien for it on the goods carried, without express stipulation, nor in any event if the voyage is abandoned before the voyage is begun. Where the advance freight is payable *"if required"*, the shipowner cannot require its payment after the shipper has ceased to be able to insure his risk. Payments for ship's use by the person liable to pay freight, before such freight is due, without authority from the contract of affreightment, will be treated rather as loans than as repayment of freight. If the payment in advance is regarded as a loan by the shipper to the shipowner, whether on security of the freight or not, it is repayable, if freight to that amount be not due from the shipper, whether the ship be lost or not, and it cannot be insured by either party(12).

(4) BACK FREIGHT

When the ship is either ready to deliver cargo at the port of destination, or is prevented by excepted perils from reaching such port, but the merchant does not take delivery or forward instructions within a reasonable time, the master, if he does not tranship in the interests of the shipowner, has the power and duty to deal with the cargo in the owner's interest at the owner's expense. He may land and warehouse it, or, if this is impracticable, may carry it in his ship, or forward it in another ship to such place as may be most convenient for its owner, and can charge the owner with remuneration for and expenses of such carriage under the name of *"back-freight"*(13).

(5) PRO RATA FREIGHT

Sometimes *"pro rata freight"* is payable, i.e. a payment proportionate

(11) Scrutton, 17th ed., pp. 333-4.
(12) *Ibid*, p. 334.
(13) *Ibid*, p. 337.

to the part of the voyage accomplished or to the part of the cargo delivered.

Vlierboom v. *Chapman*

In *Vlierboom* v. *Chapman*(14) rice was to be delivered at Rotterdam. During the voyage, some was jettisoned and the rest had to be sold at Mauritius. It was held that, as the shipowner could not have delivered at Rotterdam, no fresh agreement for the payment of pro rata freight could be inferred(14).

Christy v. *Row*

Conversely, in *Christy* v. *Row*(15) the cargo-owner expressly asked for delivery to be made at an intermediate port. In that case coal was shipped for Hamburg. Owing to the presence of a French army, it was dangerous to get to Hamburg and the cargo-owner asked for delivery at an intermediate port. Part of the cargo was delivered there, but the vessel was then ordered to leave the port. The cargo-owner refused to pay freight. It was held that there was an agreement to accept delivery at the intermediate port as a substituted performance of the contract, and full freight was payable on the goods delivered there.

(6) DEAD FREIGHT

In the case of a claim for "*dead freight*", i.e. damages for not producing a full cargo, the shipowner has a right to minimise the damage by obtaining other cargo, provided he acts reasonably in so doing. It follows that "he must also have implied liberty to delay the charter voyage by the period of time reasonably and necessarily occupied in taking in that substituted cargo"(16).

TIME CHARTERS

Regarding time charters the following points should be remembered.

(1) PAYMENT OF FREIGHT OR HIRE

Under a time charter where freight or hire, as it is more usually called, is calculated by reference to the time during which the charterer is entitled to the services of the ship, the charterer remains liable to pay hire throughout the contractual period, unless (*1*) his liability is suspended by an express provision in the charter, or (*2*) the owner, in breach of his contractual duties, fails to render the services promised under the charter, or (*3*) the charter is frustrated. Thus, in the absence of express agreement hire is payable during detention for breach of blockade, by embargo, bad weather, or repairs, unless the delay involved is so great as to frustrate the contract. The charterer cannot rely on an excepted peril such as strikes or restraint of princes, even when expressed to be

(14) (1844) 13 M. & W. 230.
(15) (1808) 1 Taunt. 300.
(16) *Wallems* v. *Muller,* (1927) 2 K.B. 99.

mutual, as excusing him from paying hire during the time in which by such excepted peril he is unable to use the ship(17).

(2) RIGHT OF WITHDRAWAL OF SHIP

One usual clause in time charters provides that in default of punctual and regular payment of hire, the shipowner shall have the ritght to withdraw the vessel from the service of the charterers. The shipowner need not make a demand for payment before exercising his right of withdrawal, and "punctual and regular" payment means payment on the day it is due. In the absence of the words "punctual and regular", hire must still, unless there are special circumstances which excuse, be paid on the due date. If the shipowner withdraws the ship, he cannot recover any hire for the period after withdrawal even though withdrawal takes place in the middle of a period hire for which is payable in advance, nor is the position different if "redelivery" does not take place immediately upon notification of withdrawal. But he can claim damages for the remainder of the agreed period of hire based upon the charterer's repudiation of the charter(18).

A ship was under a time charter at a fixed rate of hire per month, payment to be made in cash, monthly, in advance, in London. In default of such payment the owners were to have the faculty of withdrawing the vessel from the service of the charterers. There was the usual off-hire clause specifying a number of events on the occurrence of which hire should cease, none of which was applicable to the facts. Hire normally became due on the 27th of each month. On the outbreak of war in September 1939, during the currency of the charter, a dispute arose as to a voyage the charterers intended the vessel to make and pending its settlement the owners refused to place the ship at the charterers' disposal for loading. The dispute was settled on September 25, on which day the owners cabled the master to load, but the cable did not reach him and he accordingly did not place his ship at the charterers' disposal for loading. On the same day the charterers sent from Brussels a letter to Hambros Bank, London, enclosing a cheque for a month's hire from September 27; this was in accordance with the previous practice in remitting hire. Hambros Bank did not receive the cheque until October 3. On September 30 the owners gave the charterers notice that they cancelled the charter for non-payment of hire. Neither party knew by October 3 when hire was tendered that the master was still refusing to load. It was held by Atkinson J. and Bucknill L.J., that the owners were not entitled to cancel, since on September 27, they had withdrawn the ship from the service of the charterers, who were therefore not in breach for non-payment of hire. Tucker L.J. considered that although the owners were in breach of contract entitling the charterers to damages, the charterers were not thereby

(17) Scrutton, 17th ed., pp. 351-2.
(18) *Ibid*, pp. 354-5.

relieved of the obligation to pay hire and were therefore in default, thus entitling the owners to withdraw the ship. As the C.A. was equally divided, the decision of Atkinson J. stood on appeal. In the H.L. the charterers succeeded on the ground that payment had been made in the previously accepted way(19).

(3) OFF-HIRE CLAUSE

Now, provision is usually made in time charters for hire to cease in certain specified events. If hire is withheld under such a provision it is for the time charterer to establish facts bringing him within the language of the clause. The wording of the off-hire clause varies, but its general frame-work takes the form that in the event of loss of time from deficiency of men or stores, breakdown of machinery, damage, and other specified events preventing the working of the vessel for more than twentyfour working hours, the payment of the hire shall cease until she be again in an efficient state to resume her service. Hire begins again, not when the ship is in the same position as when she broke down, but when she has been repaired and is again efficient to resume her service. It may thus be payable for the time in which, having been repaired, she is proceeding to another port in order to reload cargo discharged there to enable her to repair, or proceeding to the position from which she turned back for repairs. The charterer may therefore have to pay twice for part of the voyage. Prepaid hire can be recovered in respect of that portion of time already paid for during which the ship is inefficient, as money paid for a consideration which has failed(20).

A vessel broke down in her high-pressure engine on a voyage from the West Coast of Africa to the Elbe, and put into the Canary Islands, where she was pronounced unfit to proceed. A tug was engaged as a general average expenditure, and brought her home with the use of her low-pressure engine. It was held, that under the off-hire clause, no freight was payable from the Canary Islands to the Elbe, as the ship was not in an efficient state for proceeding at sea; but that hire was due for the time during which she was discharging cargo on the Elbe, as she was efficient for that purpose, though not for proceeding to sea as a steamer(21).

(4) FINAL VOYAGE

In the absence of express provision, where a time charter is for a stated period, the time for redelivery is not normally of the essence of the contract and the charterer commits no breach of contract if, before the expiry of the charter period, he sends the vessel on a final voyage which will not be completed until after the charter period, provided that in so sending her he acts reasonably. In such circumstances he

(19) *Akt Tankexpress* v. *Compagnie F.B. des Petroles*, (1949) A.C. 76 H.L.
(20) Scrutton, 17th ed. pp. 355-8.
(21) *Hogarth* v. *Miller*, (1891) A.C. 48.

will be liable for hire at the charter and not at the current rates for the excess period. Extension of the charter period to cover the final voyage is generally expressly provided for by special clauses(22).

(5) CONDITION ON REDELIVERY

Time charters usually provide that the charterer shall redeliver the vessel in the same good order and condition (fair wear and tear excepted) as when delivered to him. If on redelivery the vessel has by the charterer's breach of contract been damaged, his liability is for damages (*i.e.* cost of repair and loss of profit during repair), but he is not liable for hire during the period occupied by the repairs(23).

(6) INDEMNITY OF SHIPOWNER

Time charters usually contain an express indemnity clause. Such clauses vary in detail but a common form is as follows : "the captain (although appointed by the owners) shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements, and the charterer hereby agrees to indemnify the owners for all consequences or liabilities that may arise from the captain signing bills of lading by the orders of the charterer or their agents or otherwise complying with such orders or direction." The range of the protection thus afforded to the shipowner has not yet been fully worked out in the decisions of the courts and will in all cases depend upon the exact language used(24).

FREIGHT, BY WHOM PAYABLE

The shipowner can claim freight from the following persons :

(*1*) the shipper of the goods ;
(*2*) consignee or endorsee of the bill of lading ;
(*3*) a seller who stops the goods *in transitu* ;
(*4*) the charterer(25).

FREIGHT, TO WHOM PAYABLE

To whom freight is payable depends on the terms of the contract of affreightment, or, if no person is named therein, on the person with whom the contract was made, to whom or to his agent freight is payable, subject to any subsequent dealings, such as assignment of the freight or mortgage of the ship.

It may be payable to :

(*1*) the shipowner ;
(*2*) the master ;
(*3*) the broker ;
(*4*) a third person ;

(22) Scrutton, 17th ed., p. 358.
(23) *Ibid*, p. 359.
(24) *Ibid*, pp. 360-61.
(25) Payne, 8th ed., p. 171.

(5) the charterer ;
(6) an assignee of the freight ; and
(7) a mortgagee of the ship(26).

(26) Scrutton, 17th ed., p. 262.

LECTURE IX

SHIPOWNER'S LIENS

(1) LIEN FOR FREIGHT AT COMMON LAW

At common law the shipowner generally has a right to retain the goods in his possession until the freight upon them, and sometimes other charges also, have been paid. This right is called a lien. It does not give the shipowner any property in the goods ; nor does it enable him to sell them ; even though the retention of them may be attended with expense. It is simply a right to keep possession, and to resist all claims to take them away. And it avails against the true owner of the goods, although he may not be the person liable for the freight or other charges (1).

The shipowner may do what is reasonable to maintain any of these liens in view of the fact that they are possessory liens, i.e. they can only be enforced by retaining actual or constructive (e.g. in a statutory warehouse) possession of the cargo. He may, of course, waive the lien for freight ; on the other hand, it can be exercised against all goods consigned to the same person on the same voyage, even under different bills of lading, but not against goods on different voyages under different contracts. Further, the common law lien for freight is not displaced unless the terms of the contract are inconsistent with it. Where freight is made payable on delivery, there will be a lien for it whether given by the contract or not. But where freight is made payable otherwise than on delivery, there will be no lien unless it is expressly given(2).

At common law the lien for freight could be enforced only by retaining the goods. The shipowner had no power to sell them in order to pay the freight. But by the Merchant Shipping Act, 1894, s. 497, a power to sell the goods is conferred after they have been warehoused for ninety days and the freight and charges on them have not been tendered. In the case of perishable goods, the power of sale may be exercised earlier(3).

Under the common law the broker or other agent who has arranged shipment of the cargo on behalf of the shipper has a lien on the bill of lading for his charges.

(2) EXPRESS LIENS

Liens may be created by express agreement, where they do not exist at common law, as, for example, for dead freight, demurrage and damages for detention. As against the charterer, a lien in respect of expenses

(1) *British Shipping Laws*, Vol. III, para. 1325.
(2) *Tamvaco* v. *Simpson*, (1866) L.R. 1 C.P. 363.
(3) Payne, 8th ed., pp. 176-177.

properly incurred by the shipowner in warehousing the goods in order to avoid demurrage would be conferred by a clause granting a lien for "freight, demurrage and all other charges whatsoever". But even a very widely worded clause giving a lien for any moneys due to the carrier from either shipper or consignee will not give a right of lien superior to the right of an unpaid seller who stops the goods *in transitu*(4).

HOW FAR ENFORCEABLE AGAINST HOLDER OF BILL OF LADING

Where express liens are conferred upon the shipowner by the terms of a charterparty, the holder of the bill of lading, if he is not the charterer, is not subject to such liens, unless they are incorporated in the bill of lading. Mere notice of the charterparty is not sufficient. Moreover, any reference in the bill of lading to the charterparty is strictly construed. Unless, therefore, the language used in the bill of lading is wide enough to extend the shipowner's rights, the holder of the bill of lading is entitled to have his goods delivered to him upon payment of the freight reserved by the bill of lading ; as against him there is no lien for freight payable under the charterparty in respect of the same or other goods, or for the difference, if any, between the bill of lading freight and the chartered freight, or for dead freight, or for demurrage at the port of loading. This rule does not apply, however, where the consignee is merely an agent of the charterer, or is his real principal, or where the bill of lading holder had reason to suspect, when he took the bill of lading, that the captain had no authority to sign bills of lading on the terms as to freight contained in the bill of lading issued to him(5).

Turner v. *Haji Azam*

In *Turner* v. *Haji Azam*(6) the question arose whether the appellants (shipowners) were entitled to a lien for freight payable under a time charter on the goods of the respondent, who was no party to that charter, but whose goods were carried in the appellants' ship under a sub-charter and bill of lading. The judge of first instance decided this question in favour of the appellants. His decision was reversed by the Court of Appeal in Bombay, and the appeal to the Privy Council was from the decision of that Court. In that case under a time charter with power to sublet the shipowners retained legal possession of the ship through the captain appointed and paid by themselves, who was to be the agent in several respects for the charterers, and in particular to sign bills of lading at any rates of freight that they might direct "without prejudice to this charter," and they also were entitled to a lien upon all cargoes for freight or charter money due under the charter. It was held, that bills of lading granted by the captain to the respondent, a sub-charterer from the charterers with notice of the time charter, were not mere receipts for

(4) *Ibid.*, pp. 177-178.
(5) Halsbury, Simonds ed., Vol. XXXV, para. 672.
(6) (1904) A.C. 826 P.C.

goods, but contracts which bound the shipowners, and that the respondent, having paid his bill of lading freight, was entitled to his goods free of lien for the time charterer's dues.

Gardner v. *Trechmann*

In *Gardner* v. *Trechmann*(7) a charterparty contained a stipulation in the usual form for payment of freight at the rate of £1 11s. 3d. per ton; it also contained a clause that the shipowner should have "an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average;" and a further clause that the captain was to sign bills of lading at any rate of freight; "but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance." Certain goods were put on board the chartered ship, and were made deliverable to the plaintiffs (who were not the charterers) by a bill of lading, whereby freight was made payable at 22s. 6d. per ton: the bill of lading contained also a clause, whereby it was provided that extra expenses should be borne by the receivers and "other conditions as per charterparty". Upon the arrival of the ship at the port of discharge the defendant, who was the shipowner, claimed and compelled payment of freight at the rate mentioned in the charterparty. The plaintiffs having sued to recover back the difference between the freight as specified in the charterparty and the freight as specified in the bill of lading, it was held by Brett M.R., Cotton L.J. and Lindley L.J. that the bill of lading did not incorporate the stipulation in the charterparty as to the payment of freight, that no right of lien existed for the freight mentioned in the charterparty, and that the plaintiffs were entitled to delivery of the goods upon payment of the freight specified in the bill of lading.

(3) MARITIME LIENS—NATURE AND EXTENT OF MARITIME LIENS

A "maritime lien" is a claim or privilege upon a maritime res in respect of service done to it or injury caused by it. Such lien does not import or require possession of the res, for it is a claim or privilege on the res to be carried into effect by legal process. A maritime lien travels with the res into whosesoever possession it may come, even though such res may have been purchased without notice of the lien or may have been seized by the sheriff under a writ of fieri facias issued at the instance of execution creditors. A maritime lien is inchoate from the moment the claim or privilege attaches, and when called into effect by the legal process of a proceeding in rem relates back to the period when it first attached.

There can be no maritime lien upon a res which is not a ship or her apparel or cargo and, if a lien has attached to a maritime res and that res is sold by the owner, there is no lien against the proceeds of sale

(7) 15 Q.B.D. 154.

since the lien travels with the res. A maritime lien only attaches to the particular res in respect of which the claim arises and not to any other property of the owner.

A maritime lien does not attach when the res belongs to the Crown or is owned by a foreign state. Where a ship is under requisition by the Crown or a foreign state no lien attaches in respect of damage done by her whilst under requisition, but, where salvage services are rendered to a ship under requisition and her owners derive some benefit from those services, a maritime lien does attach although it is unenforceable whilst the ship remains under requisition(8).

MARITIME LIENS RECOGNISED BY ENGLISH LAW

The maritime liens recognised by English law are those in respect of bottomry and respondentia bonds, salvage of property, seamen's wages and damage. A maritime lien has been held not to exist in respect of towage or necessaries. It is doubtful whether or not a maritime lien exists in respect of pilotage dues.

Rights and remedies, similar to those enjoyed by the holder of a maritime lien and enforced in similar manner, have been created by statutory provision. These include a right to life salvage in certain circumstances though the salvors of life have not themselves salved any property; certain claims in respect of matters which though not wages may be recovered in the same manner in which seamen's wages may be recovered; claims in respect of the wages, disbursements and liabilities of the master of a ship; claims in respect of damage to land caused by persons rendering services to a vessel wrecked, stranded or in distress; claims in respect of the fees and expenses of a receiver of wreck; and claims in respect of the expenses of a local authority incurred on account of the burial or destruction of the carcase of any animal of carcase thrown or washed from any vessel(9).

EXTENT OF JUDGMENT IN REM

A judgment in rem of a foreign court of competent jurisdiction in respect of a maritime lien is regarded by the English courts as conclusive and binding against all the world even though a maritime lien would not have arisen in the same circumstances under English law. A judgment in rem of a foreign court of competent jurisdiction will be enforced in the English courts by an action in rem; but a judgment in personam of a foreign court of competent jurisdiction will not be enforced in the English courts by an action in rem even though in the same circumstances there would be a maritime lien under English law(10).

(8) Halsbury, Simonds ed., Vol. XXXV, para. 1202.
(9) *Ibid*, para. 1204.
(10) *Ibid*, para. 1203.

LIEN FOR DAMAGE DONE BY A SHIP

PROPERTY TO WHICH LIEN ATTACHES

The lien for damage done by a ship arises when damage is done by the ship to another ship or property, whether on the high seas or in the body of a country, through some wrongful act of navigation of the ship from want of skill or from negligence of the persons by whom she is navigated, being at the time of the damage her owners or the servants of her owners, or having the possession and control of her by their authority. The moment the damage is done by the ship the lien attaches to her hull, tackle, apparel, furniture and freight. It does not originate in possession and it follows the ship into whosesoever possession it may pass, and continues even after the ship is wrecked, and may be enforced against the wreckage. The lien on freight can, however, only be enforced in company with the enforcement of a lien on the ship, being consequential to that lien(11).

LIEN FOR SALVAGE

The lien for salvage is created by the rendering of salvage services to a maritime res or, in certain circumstances, by the saving of life from a ship. The lien attaches to the ship, freight and cargo severally but not jointly, and each is liable to contribute towards the salvage in proportion to its value, but cannot, except in cases of express agreement, be made liable for the salvage due from the other. The lien accrues immediately upon the performance of the salvage services and attaches to the salved vessel, her cargo and freight where freight has been saved. It is unaffected by any change in the ownership or possession of the salved property, and the benefit of it can be lost only by the laches of the salvor(12).

LIEN FOR WAGES

The lien for the wages of the master and seamen attaches to the ship and freight and every part thereof, provided the wages have been earned on board the ship under an ordinary mariner's contract. It does not affect the right to the lien that the master and crew were engaged by some person who had no right to engage them, so long as they have earned the wages on the ship. This lien is not dependent on the earning of freight, but if it does not attach to the ship it cannot attach to the freight, for a lien on freight is consequential to the lien on the ship. The lien for wages travels with the res into whosesoever possession it may come(13).

LIEN IN CASE OF BOTTOMRY OR RESPONDENTIA BOND

As soon as a bottomry or respondentia bond is executed a lien attaches

(11) *Ibid*, paras. 1205, 1206.
(12) *Ibid*, para. 1207.
(13) *Ibid*, para. 1208.

to the property hypothecated, and continues to attach until the total destruction of the property. The lien for a bottomry bond travels with the res into whosesoever possession it may come (14).

ARREST OF SHIP

In some cases there is a statutory right to arrest a ship. For example, where there is a claim for towage or salvage, or where goods or materials have been supplied to a ship for her operation on maintenance, or where there is a dispute as to the ownership of a ship, or where there is a claim by the master or seamen for wages earned, the court may arrest the ship or a ship in the same ownership until the dispute is determined.

The object of arresting the ship is of course, to secure her continued presence and to prevent her from slipping away. The right does not, strictly speaking, give rise to a lien, though it is sometimes so described. It should be noted that any maritime liens attaching to the ship at the time of her arrest have priority over the claim for which she was arrested(15).

PRIORITY OF MARITIME LIENS GENERALLY

Maritime liens are of two classes, namely, those arising *ex delicto ;* and those arising *ex contractu* or *quasi ex contractu,* such as wages, bottomry and salvage. Though all maritime liens, whether arising *ex delicto* or *ex contractu* or *quasi ex contractu,* are the same, yet in practice they usually rank according to two broad principles. In the first place, liens arising *ex delicto,* in the absence of laches, rank as between themselves *pari passu,* but in priority to liens arising *ex contractu,* except a subsequent lien for salvage. Secondly, as a general rule, maritime liens arising *ex contractu* or *quasi ex contractu,* namely, those for master's wages, disbursements and liabilities, seamen's wages, bottomry and salvage, are payable in the inverse order of their attachment on the res, though as between themselves wages rank *pari passu*(16).

STATUTORY LIEN FOR NECESSARIES, PRIORITY OF

The statutory lien for necessaries as a general rule ranks after maritime liens but takes priority over a master's lien for wages and disbursements when supplied by the order of a master who is part owner of the ship(17).

PRIORITY OF POSSESSORY LIENS

Possessory liens take priority over all claims arising after the ship is taken into possession, but are postponed to those liens which were created before that time, as the holder of the lien is presumed to have taken the ship into his possession with the obligations then upon it. The

(14) *Ibid*, para. 1210.
(15) Payne, 8th ed., p. 181.
(16) Halsbury, Simonds ed., Vol. XXXV, para. 1214.
(17) *Ibid*, para. 1221.

mere fact that claimants with maritime liens have benefited by the work of the repairers is not, however, a sufficient reason why those maritime liens should be postponed to the repairers' possessory lien. The statutory possessory lien of a dock or harbour authority overrides all maritime liens(18).

SOLICITOR'S LIEN FOR COSTS

The solicitor's lien for costs takes priority over necessaries supplied after the inception of the lien, and to the master's claim for wages when he is part owner and has instructed the solicitor. It is postponed to the expense of sending home a ship-wrecked foreign crew incurred by a foreign consul(19).

MODE OF DETERMINATION OF CLAIMS

While the rights of claimants may be determined by the *lex loci* or the law of the flag of the ship, all questions of priority of liens or claims are determined in England by the *lex fori*(20).

ENFORCEMENT OF MARITIME LIENS

Maritime liens are enforced by a proceeding in rem, followed by the arrest, and if necessary by the sale, of the res. To enforce such a lien a court having Admiralty jurisdiction will seize the ship and forcibly dispossess those who claim to detain her or her apparel. The court will seize and sell a ship even though she is in the possession of the holder of a possessory lien or the sheriff at the instance of execution creditors(21).

As a general rule maritime liens other than the lien for bottomry are not transferable.

ENFORCEMENT OF STATUTORY LIENS

Statutory liens which owe their inception to a proceeding in rem and the arrest of a res are enforced by sale of the res subject to the same conditions as apply to the satisfaction of maritime liens(22).

ENFORCEMENT OF POSSESSORY LIENS

The holder of a possessory lien cannot enforce it by sale, but can only continue to hold the property until his claims are paid, even though to do so entails expense ; but should he be dispossessed by a court having Admiralty jurisdiction, then out of the proceeds of the ship he will be paid his claim according to the rules as to priorities(23).

Claims to enforce liens are liable to be statute-barred.

(18) *Ibid*, para. 1222.
(19) *Ibid*, para. 1223.
(20) *Ibid*, para. 1224.
(21) *Ibid*, para. 1225.
(22) *Ibid*, para. 1227.
(23) *Ibid*, para. 1228.

EXTINCTION OF LIENS

A maritime or statutory lien is extinguished by giving bail or a guarantee to prevent the arrest or secure the release of the res in an action to enforce the lien, by the arrest and sale of the ship in an action in rem by a court of competent jurisdiction, whether English or foreign, by assignment without the sanction of the court, and by failure to bring in the claim arising from it within the time ordained by the court in limitation proceedings.

Possessory liens are extinguished by payment, by yielding up possession or by arrest of the ship by a court of competent authority(24).

Before concluding this lecture on shipowners' liens it will be useful to refer to certain important judgments which are very illuminating.

The Bold Buccleugh

In *The Bold Buccleugh*(25), an English case which has ever since been recognized as a leading authority on both sides of the Atlantic, it was held that a lien for collision damage could be enforced against the offending ship in the hands of an owner who had bought her after the collision and whose good faith and lack of notice the court was willing to assume. *The Bold Buccleugh* was decided by the Privy Council in 1852, and the amorphous state of maritime lien law at that date is illustrated by the fact that the judges found no English precedents to rely on and had to content themselves with repeating Justice Story's general language about maritime liens. In delivering judgment Sir John Jervis said:

> "A maritime lien does not include or require possession. The word is used in maritime law not in the strict legal sense in which we understand it in Courts of Common Law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the Civil Law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosesoever possession it came. Having its origin in this rule of the Civil Law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story explains that process to be a proceeding in rem, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty forces it by a proceeding in rem, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien

(24) *Ibid*, para. 1229.
(25) (1852) 7 Moore P.C. 267, 284.

exists, a proceeding in rem only may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege [i.e. a maritime lien] travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached.....

"This rule, which is simple and intelligible, is in our opinion applicable to all cases. It is not necessary to say that the lien is indelible and may not be lost by negligence or delay where the rights of third parties may be compromised ; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosesoever possession the thing may come".

The Ripon City

In his classic judgment delivered in the case of *The Ripon City* Sir Gorell Barnes (later Lord Gorell) observed:

"Whatever may have been the origin and process of development of a maritime lien for damage, there is no doubt that the doctrine of such a lien is now established, and the right to enforce it is different from the ancient right of arrest to compel appearance and security in this, that it is confined to the property by means of which the damage is caused, and may be enforced against that property in the hands of an innocent purchaser. I believe that the earliest English authority which distinctly establishes this doctrine is *The Bold Buccleugh*(25), where it was held by the Privy Council that in cases of collision a maritime lien for damage arises and may be enforced against the vessel which was in fault, and that such lien travels with the vessel into whosesoever possession she may come, and when carried into effect by a proceeding in rem relates back to the period when it first attached. *The Bold Buccleugh*(25) was approved by the House of Lords in *Currie* v. *M'Knight**, where the learned Lords considered the judgment of the Judicial Committee satisfactory in its reasoning, and that it was not only consistent with the principles of general maritime law, but rested upon plain considerations of commercial expediency.

"The definition of a maritime lien as recognised by the law maritime given by Lord Tenterden has thus been adopted. It is a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried into effect by legal process..... The result of my examination of these principles and authorities is as follows: The law now recognises maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, masters' wages disbursements and

*(1897) A.C. 97.

liabilities, and damage. According to the definition above given, such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner. The person who has acquired the right cannot be deprived of it by alienation of the thing by the owner. It does not follow that a right to a personal claim against the owner of the res always co-exists with a right against the res. The right against the res may be conferred on such terms or in such circumstances that a person acquiring that right obtains the security of the res alone, and no rights against the owner thereof personally(26)."

France Fenwick Tyne & Wear Co. Ltd. v. *H. M. Procurator General*

In *France Fenwick Tyne & Wear Co. Ltd.* v. *H. M. Procurator General*(27), a question arose whether a claim for remuneration in respect of civil salvage services rendered to a vessel before her seizure in prize, with the result that the vessel had been saved and the seizure effected was enforceable in the Prize Court in the exercise of its equitable jurisdiction. The question was answered in the affirmative by the Privy Council, and Lord Wright in the course of delivering the judgment of the Board said:

"Maritime liens hold an honoured place in the maritime law as enforced in the Admiralty Court. That form of remedy is particularly important in a court like the Admiralty Court which is largely concerned with foreign litigants. The maritime lien enables the res to be made available to enforce the liability, though it also impleads the owners personally. In modern times, questions relating to maritime liens have been fully discussed particularly in *The Parlement Belge*(27-1), *The Dictator* (28) and *Compania Naviera Vascongado* v. *S. S. Cristina*(30). The true nature of a maritime lien, which differs from a common law or possessory lien in that it does not depend on possession but attaches to the property into whatsoever hands it goes (*The Bold Buccleugh*)(25), was also well defined by that great lawyer, Lord Gorell (then Gorell Barnes J.) in *The Ripon City*(26) as being 'a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing.' Lord Gorell is here using the term 'jus in re' in a

(26) (1897) p. 226, 241-3.
(27) (1942) A.C. 667 (P.C.).
(27-1) (1880) 5 P.D. 197.

different sense from that in which Lord Stowell used it in the passage cited above*. The latter applied the term jus in rem to a right requiring to be carried into effect by legal process, whereas a jus in re was to him, primarily at least, a right depending on possession of the thing. In the Prize Court what is material is the absolute or general property which gives the thing its national character. A right subtracted from that property of the type which is often described as a special property, or, more precisely, a special interest not visible or tangible, does not affect the captor's rights. Lord Stowell's opinion is categorical on this point and has been often repeated. Later judges have taken the same view. Thus the Supreme Court of the United States in *The Hampton*** stated the rule in reference to a mortgage. The material passage of that judgment is quoted by Sir Samuel Evans P. in *The Marie Glaeser**** : "'In proceedings in prize, and under principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens, subject to being overridden by the capture, not as jura in re, capable of an enforcement superior to the claims of the captors.'" Miller J. in *The Hampton***, in delivering the judgment of the court, pointed out that any other rule would tend materially to destroy the right of prize capture in time of war. In substance, the reason is that the captor could never know that the thing he was seizing was enemy property, because, if such liens or special interests were recognized, the effect would be that enemy property in part, or even in whole, might be granted immunity in favour of mortgagees or lien holders, and the enemy or the neutral exposing his goods to the risk of capture under international law would pro tanto be saved from the risk of loss.

"It does not, however, necessarily follow that maritime liens, such as liens for salvage, would be governed by the same principles as are applied in the case of mortgages, bottomry bonds and the like. The latter depend on the private contracts of individuals and their effect under the appropriate municipal laws, whereas the lien for salvage depends on the general maritime law"(27).

Compania Naviera Vascongado v. *S. S. Cristina*

And Lord Wright, while considering the nature of the modern writ in rem, said:

"The history and effect of that writ have been fully explored by Jeune J. in *The Dictator*(28), approved and followed by the Court of Appeal in *The Gemma*(29). It seems that originally the warrant was issued for

* *The Tobago*, (1804) 5 C. Rob. 218, 221-223.
** (1866) 5 Wall. 372.
*** (1914) p. 218, 234.
(28) (1892) p. 304.
(29) (1899) p. 285.

the purpose of compelling the defendant to appear and submit to the Court, and was directed not merely against the property said to be the instrument of injury but any property of the defendant or even himself personally. But the modern writ in rem has become a machinery directed against the ship charged to have been the instrument of the wrongdoing in cases where it is sought to enforce a maritime or statutory lien, or in a possessory action against the ship whose possession is claimed(30)."

(30) *Compania Naviera Vascongado* v. *S. S. Cristina*, (1938) A.C. 485, 504 (H.L.).

LECTURE X

PRINCIPAL INDIAN ENACTMENTS AFFECTING THE CONTRACT OF AFFREIGHTMENT

The principal Indian enactments affecting the contract of affreightment are—

(*1*) the Bills of Lading Act IX of 1856, and
(*2*) the Carriage of Goods by Sea Act XXVI of 1925.

This lecture will be devoted to the consideration of these two Acts, the provisions of which closely follow the language of, and are substantially the same as, their English counterparts, with necessary modifications to suit local conditions.

(1) BILLS OF LADING ACT IX OF 1856

(*1*) *The Bills of Lading Act IX of 1856.*—This Act was enacted a year after the English Bills of Lading Act of 1855 (18 & 19 Vict. c. 111) was placed on the statute-book.

Relevant observations about bills of lading have already been made, and relevant decisions have been referred to, in a previous lecture(1), and it is not necessary to repeat what has been already said. But the following provisions of the Act should be remembered :—

"1. Rights under bills of lading to vest in consignee or endorsee.—Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract in the bill of lading had been made with himself.

"2. Not to affect right of stoppage *in transitu* or claims for freight.—Nothing herein contained shall prejudice or affect any right of stoppage *in transitu* or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

"3. Bill of lading in hands of consignee, etc., conclusive evidence of the shipment as against master, etc.—Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some

(1) Lecture II.

part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board :

Provided that the master or other person so signing may exonerate himself, in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder or some person under whom the holder claims."

(2) CARRIAGE OF GOODS BY SEA ACT XXVI OF 1925

(2) *The Carriage of Goods by Sea Act XXVI of 1925.*—This Act consists of seven sections and a Schedule. The preamble to the Act has been slightly amended by the Amending Act LII of 1964, and it runs now as follows :—

"WHEREAS at the International Conference on Maritime Law held at Brussels in October 1922, the delegates at the Conference agreed unanimously to recommend their respective Governments to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading ;

"AND WHEREAS at a meeting held at Brussels in October, 1923, the rules contained in the said draft convention were amended by the Committee appointed by the said Conference ;

"AND WHEREAS it is expedient that the said rules as so amended and as set out with modifications in the Schedule should, subject to the provisions of this Act, have the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading ; It is hereby enacted as follows :"

Section 7 of the Act of 1925 had to be amended in view of the enactment of the Indian Merchant Shipping Act XLIV of 1958, which repealed the English Merchant Shipping Act of 1894 in so far as it applied to India, and Section 7, as amended by Act LII of 1964, is to the following effect :—

"Section 7.—Saving and operation.—(*1*) Nothing in this Act shall affect the operation of Sections 331 and 352 of the Merchant Shipping Act, 1958 (44 of 1958) or the operation of any other enactment for the time being in force limiting the liability of the owners of sea-going vessels.

(*2*) The rules shall not by virtue of this Act apply to any contract for the carriage of goods by sea before such day, not being earlier than the first day of January, 1926, as the Central Government may, by notification in the Official Gazette, appoint, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid."

HISTORY ETC. OF ENGLISH CARRIAGE OF GOODS BY SEA ACT, 1924

It will be interesting to consider briefly the circumstances which led

to the enactment of the English Carriage of Goods by Sea Act of 1924 (14 & 15 Geo. V, c. 22), the purpose of which is "to standardise within certain limits the rights of the holder of every bill of lading against the shipowner".

In 1893 the Congress of the United States of America passed the Harter Act. After the Harter Act was passed, several other countries, including some British Colonies, legislated on similar lines, but not in every case using similar words. The terms of bills of lading having become more and more diverse, it was felt by a large number of shipowners, merchants and bankers in the United Kingdom and other countries that it was desirable to make the law of the countries interested in international trade as nearly as possible uniform with regard to matters dealt with by the Harter Act.

A meeting of the International Law Association was held at the Hague in September 1921 and certain rules, known as the "Hague Rules 1921", were formulated and recommended for international adoption.

The delegates at the Diplomatic Conference on Maritime Law held at Brussels in October 1922 recommended to their respective Governments the adoption of the Hague Rules in respect of all "outward" bills of lading with slight modification as the basis for legislation.

The Hague Rules were subsequently amended at Brussels in October 1923 by a Committee which had been appointed by the Conference. The amended draft convention of October 1923 is referred to in the preamble to this Act, which gave effect in 1924 to the labours of the Conferences of 1922 and 1923. As indicated by the preamble, the object of the Act was to implement the international convention for the unification of certain rules relating to bills of lading, and the provisions of the Act itself apply only to the carriage of goods covered by a bill of lading or other similar document.

After the passing of this Act the "International Convention for the unification of certain Rules of Law relating to Bills of Lading" was signed at Brussels on August 25, 1924.

"HOMEWARD" BILLS OF LADING UNAFFECTED BY ACT

"Homeward" bills of lading are not affected by this Act, but different considerations will arise (*1*) where by the law of the country of issue of the bill of lading it is provided that the Rules or some modification shall be incorporated and such Rules are in fact incorporated in the bill of lading, and (*2*) where in spite of the local law such Rules are not so incorporated. Failure to incorporate the Rules in a bill of lading as provided by Section 3 of this Act will not render the contract illegal.

The Rules scheduled to this Act have radically changed the legal status of sea-carriers under bills of lading. According to the previous law, shipowners were generally common carriers, or were liable to the obligations of common carriers, but they were entitled to the utmost freedom to restrict and limit their liabilities, which they did by elaborate and mostly illegible exceptions and conditions. Under this Act and

these Rules, which cannot be varied in favour of the carrier by any bill of lading, their liabilities are precisely determined, and so also their rights and immunities(2).

GENERAL SCHEME OF THE RULES

The general scheme of the Rules is as follows : Article II provides that in every contract of carriage of goods as defined in Article I, with the exception of certain special shipments dealt with in Article VI (extended by section 4 of the Act to the coasting trade as therein defined), the carrier shall be subject to the responsibilities and liabilities contained in Article III, and entitled to the rights and immunities contained in Article IV. In the result : (i) The Articles impose on the carrier certain minimum responsibilities which he cannot reduce, e.g. to exercise due diligence to provide a seaworthy ship, and to issue on demand a bill of lading in a particular form. (ii) Responsibility for performing other operations may be divided between the carrier and the shipper, charterer or consignee in whatever manner the parties may wish, provided that no term will be effective if it is inconsistent with the main object and intention of the particular bargain. In so far as the carrier does undertake to carry out the operations he must do so properly and carefully. (iii) The Articles confer on the carrier certain maximum exceptions, which he cannot increase(3).

ACT DOES NOT APPLY TO CHARTERPARTIES

The Act does not apply to charterparties, but the provisions of the Act may in part or whole be expressly incorporated in a charterparty(4).

POSITION OF BILL OF LADING ISSUED UNDER CHARTERPARTY

One of the most serious difficulties, as pointed out in the oftquoted standard text-book on this branch of law, is to determine the position of a bill of lading issued under a charterparty :

'First as to the form : Article V of the Rules (second paragraph) provides that "the provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these Rules." The reference appears to be to the form prescribed by Article III, Rule 3, by which the "carrier" must on demand issue a bill of lading showing marks, number of packages or pieces or quality or weight, and the apparent order and condition of the goods, and to Article III, Rule 7, which deals with "shipped" bills of lading.

'Where the shipper is not the charterer, it may be that no difficulty will arise ; but where the charterer wishes to use the ship for his own goods, it is more than doubtful whether he will be entitled to demand

(2) *Gosse Millard* v. *Canadian*, (1927) 2 K.B. 432, 434.
(3) Scrutton, 17th ed., pp. 395-6.
(4) *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.*, (1959) A.C. 133.

the issue of a bill of lading in accordance with the provisions of these Rules.

'For as between the charterer and the shipowner the operative document is the charterparty, the bill of lading being generally a mere receipt (see Art. 18, ante, and Note thereto), and there is between them no "contract of carriage" within the meaning of Article I(b) and, therefore, the shipowner is not within the meaning of Article I(a) a "carrier" (i.e., a person who "enters into a contract of carriage"), on whom alone is imposed the obligation to issue a bill of lading in accordance with Article III, Rule 3. So long, therefore, as the bill of lading conforms with the terms of the charterparty, there seems to be nothing in the Act or the Rules to compel the shipowner to issue to such a charterer a bill of lading in the form required by Article III, Rule 3. If, therefore, "the number of packages or pieces or quantity or weight" has not been inserted in the bill of lading issued, it is difficult to see how even a subsequent holder of the bill of lading will be able to claim the benefits of Article III, Rules 3 and 4, though it may be that the court will be able to give them some retroactive effect.

'Secondly, as to the obligations imposed on the shipowner. At common law the operative document as between the shipowner and the charterer is the charterparty, and the bill of lading issued to the charterer generally acts as a receipt and so long as it remains merely a receipt the Rules will not apply. However, as between the shipowner and subsequent "holders" of the bill of lading, apart from the present Act, the bill of lading is the operative document. Under the present Act "contract of carriage" is so defined by Article I(b) that the Rules will apply to such a bill of lading with the result that any term in it which is in conflict with Article III, Rule 8, will be rendered null and void and the carrier will incur the liabilities prescribed by the Rules. In many and in an increasing number of cases, no doubt, the chartered ship will issue a bill of lading in such a form as will incorporate the provisions of the Act. But such a bill of lading may not always be used by the ship, and, if not, the shipowner will incur to parties other than the charterer liabilities which would not have fallen upon him if the charterer had not indorsed the bill of lading to them. It would, therefore, be prudent for the shipowner in all cases where his ship is under a charter to provide in the charterparty for an indemnity from the charterer against any liability so incurred'(5).

CONSTRUCTION OF THE ACT

The English Act was intended not to codify English law, but to unify certain rules relating to bills of lading, and so it was held that it should be interpreted without any predilection for the former law of England, though words which have already in the particular context received

(5) Scrutton, 17th ed. pp. 396-7.

judicial interpretation in England may be presumed to be used in the sense already judicially imputed to them(6).

REMARKS APPLICABLE TO ENGLISH ACT APPLY WITH EQUAL FORCE TO INDIAN ACT

The above remarks apply with equal force to the provisions of the Indian Carriage of Goods by Sea Act, 1925, which closely follows its English counterpart with necessary modifications. But the Schedule to the Indian Act is the same as that of the corresponding English Act.

PROVISIONS OF THE SECTIONS OF THE INDIAN ACT OF 1925

The provisions of the Indian Act of 1925 may now be considered along with such comments as may be necessary. Section 1 enacts that "it extends to the whole of India." Prior to this enactment the common law of England was the law applicable as far as India was concerned(7).

Section 2 lays down :

"Application of rules.—Subject to the provisions of this Act, the rules set out in the Schedule (hereinafter referred to as "the rules") shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in India to any other port whether in or outside India."

The words "from any port in India" correspond to the words "from any port in Great Britain" in Section 1 of the English Act of 1924, and may be said to govern the words "carriage of goods by sea", and the Rules apply only in cases where the goods were shipped from India and cover such carriage until discharge.

Unless the starting point or the port of loading is a port in India, the Act is inapplicable(8).

Section 3 states :

"There shall not be implied in any contract for the carriage of goods by sea to which the rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship."

Section 4 enacts :

"Every bill of lading, or similar document of title, issued in India which contains or is evidence of any contract to which the rules apply, shall contain an express statement that it is to have effect subject to the provisions of the said rules as applied by this Act."

Although the words "shall contain" are used, the provisions of this section have been construed as "directory" and not "obligatory". No penalty is imposed by the Act for failure to comply with these provisions(9).

(6) Halsbury's *Laws of England*, Hailsham ed., Vol. XXX, Art. 767 ; *Gosse Millard* v. *Canadian*, (1929) A.C. 223 ; *Stag Line* v. *Foscolo Mango* (1932) A.C. 328 ; *East & West Steamship Co.* v. *Ramalingam*, A.I.R. 1960 S.C. 1058.

(7) *B.I.S.N. Ltd.* v. *Sokkalal*, A.I.R. 1953 Mad. 3.

(8) *Province of Madras* v. *Machado*, A.I.R. 1955 Mad. 519.

(9) cf. *Vita Food Products* v. *Unus Shipping Co.*, (1939) A.C. 227, 294, 295 (per Lord Wright). See also *Province of Madras* v. *Machado* A.I.R. 1955 Mad. 519.

The "express statement" mentioned in this section in practice takes a variety of forms and is often described as a "clause paramount", but the omission of such express statement will not make the bill of lading illegal or void(10). When incorporated in a charterenparty, as it often is, as opposed to insertion or incorporation in a bill of lading for whieh it was clearly designed, it has the effect of rendering all voyages under the charter (whether cargo-carrying or otherwise) subject to the terms of the Act(11). This section does not apply to bills of lading issued to a charterer under a charterparty. Since such documents are a mere receipt until transfer, when they may create a contract between the carrier and the transferee under section 1 of the Bills of Lading Act, 1855, this section of the Act evidently does not apply to them(12).

Section 5 states :

"Article VI of the Rules shall, in relation to (*a*) the carriage of goods by sea in sailing ships carrying goods from any port in India to any other port whether in or outside India, and

(*b*) the carriage of goods by sea in ships carrying goods from a port in India notified in this behalf in the Official Gazette by the Central Government to a port in Ceylon specified in the said notification have effect as though the said Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted."

Section 6 lays down :

"Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the rules, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper."

The words "bulk cargo" mean cargo which is trimmed and not stowed, and include a whole or a part cargo shipped in bulk such as coal, unbagged grain or oil in bulk(13).

Section 7, which deals with "saving and operation", has been already referred to. The words "similar document of title" occur in several places in the Act and are to be found also in the Canadian Water-Carriage of Goods Act, 1910. The words include what is known as a "received for shipment" bill of lading—a document issued before shipment as distinguished from a bill of lading properly so called which is not signed or delivered until after shipment has taken place(14).

(10) Scrutton, 17th ed., p. 403.
(11) *Adamastos Shipping Co.* v. *Anglo-Saxon Petroleum Co.*, (1959) A.C. 133.
(12) *British Shipping Laws*, Vol. II, para. 247.
(13) *Hird* v. *Rea*, (1939) 63 Ll.L.R. 261.
(14) *Mack* v. *Burns*, (1944) 77 Ll.L.R. 377.

LECTURE XI

PRINCIPAL INDIAN ENACTMENTS AFFECTING THE CONTRACT OF AFFREIGHTMENT

In this lecture attention will be invited to the provisions of the Articles and Rules of the Schedule to the Carriage of Goods by Sea Act XXVI of 1925.

PROVISIONS OF SCHEDULE TO THE INDIAN ACT OF 1925

The Schedule to the Act of 1925, like its English counterpart, is arranged in nine Articles, the first eight of which are practically identical with Articles I to VIII of the "International Convention for the Unification of certain Rules of Law relating to Bills of Lading" signed at Brussels on August 25, 1924. The English Act of 1924 was passed on August 1, 1924, in anticipation of the signing of the Convention, and the Indian Act of 1925 received assent on September 21, 1925. Articles I to VIII of the Convention contain rules for incorporation in bills of lading, while Articles IX to XVI contain provisions regarding their adoption by municipal legislation, and regarding accession to, and ratification, denunciation and amendment of, the Convention(1). Article IX of the Schedule reprodues only part of Article IX of the Convention.

The topics dealt with in the first eight Articles of the Schedule to the Act of 1925 are the following :

Article I.	Definitions.
Article II.	Risks.
Article III.	Responsibilities and Liabilities.
Article IV.	Rights and Immunities.
Article V.	Surrender of Rights and Immunities and Increase of Responsibilities and Liabilities.
Article VI.	Special Conditions.
Article VII.	Limitations on the Application of the Rules.
Article VIII.	Limitation of Liability.

Article IX states that the monetary units mentioned in these Rules are to be taken to be gold value.

ARTICLE I

DEFINITIONS

Now, Article I, which deals with definitions, runs as follows :

"'In these Rules the following expressions have the meaning hereby assigned to them respectively, that is to say—

(1) *British Shipping Laws,* Vol. II, para. 221.

CARRIER

(*a*) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper :

CONTRACT OF CARRIAGE

(*b*) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same :

GOODS

(*c*) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried :

SHIP

(*d*) "Ship" means any vessel used for the carriage of goods by sea :

CARRIAGE OF GOODS

(*e*) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.'"

Some of the subjects included in this Article have been already discussed(2), and the only comment which should be made here is that this Article and Article VI may be reconciled by construing the words "contracts of carriage covered by a bill of lading" as meaning contracts of carriage under which the shipper is entitled to demand a bill of lading evidencing the contract(3).

ARTICLE II

RISKS

Article II, which speaks of "risks", is to the following effect :

"Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth."

This Article is subject to Article VI, which is modified by S. 5 of the Act as regards goods carried in sailing ships and by certain routes.

(2) See Lectures II-VII.

(3) Halsbury, Simonds ed., Vol. XXXV, p. 537, n(c) ; Scrutton, 17th ed., p. 431 ; *Indian Shipping* v. *Dominion*, A.I.R. 1953 Bom. 396.

The clearing up of the spillage is ancillary to the process of loading or unloading. Bagging is a part of loading. "Stowing" or "trimming" is actually a part of loading. "Trimming" is usually applied to mean the shovelling of bulk cargo during the loading into holds or parts of holds which cannot be reached "by gravity flow."

ARTICLE III

RESPONSIBILITIES AND LIABILITIES

Article III is an important Article dwelling on "responsibilities" and "liabilities" and provides :

"1. The Carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(*a*) Make the ship seaworthy ;

(*b*) Properly man, equip, and supply the ship ;

(*c*) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

BILL OF LADING TO BE ISSUED ON DEMAND OF SHIPPER

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(*a*) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage ;

(*b*) Either the number of packages or prices, or the quantity, or weight, as the case may be, as furnished in writing by the shipper ;

(*c*) The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(*a*), (*b*) and (*c*).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the

carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any preson other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

LIMITATION FOR SUIT

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a 'shipped' bill of lading.

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability."

In addition to what has already been said(4) about some of the subjects included in this Article it will be helpful to make the following comments here.

(4) See Lectures II-VII.

LIABILITY SUBJECT TO ARTICLE IV

From the words "Subject to the provisions of Article IV" used in Rule 2 of this Article it is clear that liability under this rule is subject to the provisions of Article IV. Where the shipowner proves a prima facie case that he is within an exception, if the cargo-owner wants to defeat that plea it is for him by rejoinder to allege and prove either negligence or unseaworthiness. If the carrier pleads an exception, the goods-owner may counter by pleading the fault of the carrier, and the onus of proving that is on the goods-owner who makes it(5).

In the case of bulk cargoes Rule 4 of this Article is modified by Section 6 of the Act. This rule does not affect the master's liability under Section 3 of the Bills of Lading Act, 1856. This rule has nothing to do with the order and condition of goods shipped.

BILLS OF LADING ACT, 1856, UNAFFECTED BY THIS ACT

APPLICABILITY OF RULES TO BILLS OF LADING ISSUED UNDER CHARTERPARTY

The Bills of Lading Act, 1856, is unaffected by the Carriage of Goods by Sea Act, 1925. Only the actual shipper can demand a bill of lading complying with the provisions of Art. III, r. 3. Where bills of lading are issued under a charterparty to the charterer the Rules apply to them to some extent and such bills of lading must comply with the terms of the Rules. In such cases the charterer, as shipper, appears to be the person who is entitled to demand a bill of lading complying with Art. III, r. 3, and who is under obligation to indemnify the carrier under Art. III, r. 5.

LOSS

The word "loss" has been recently held by the Supreme Court to mean and include any loss caused to a shipper or a consignee by reason of the inability of the ship or the carrier to deliver part or whole of the goods, to whatever reason such failure may be due(6).

A cargo-owner will lose any remedy he has against the carrier unless the suit is instituted within one year(7), or the carrier waives that requirement by submitting to arbitration(8).

ACTION BEFORE THE COURT MUST BE INSTITUTED WITHIN THE PERIOD OF LIMITATION

With reference to Rule 6 of Article III of the Schedule to the English Act of 1924 (which is identical with Rule 6 of this Article) a recent

(5) *Constantine S. S. Co.* v. *Imperial Smelting Corporation,* (1942) A.C. 154; *Svenska Traktor* v. *Maritime Agencies,* (1953) 2 Q.B. 295; *A.S.N. Co.* v. *Jethalal,* A.I.R. 1959 Cal. 479.

(6) *East & West Steamship Co.* v. *Ramalingam,* A.I.R. 1960 S.C. 1058, 1065.

(7) *Haji Shakoor* v. *Volkart,* A.I.R. 1931 S. 124; *Haji Shakoor* v. *Hinde,* A.I.R. 1932 Bom. 330.

(8) *Son Shipping Co.* v. *De Fosse & Tanghe,* (1952) 199 Fed. Rep. 2nd ed., p. 687. But see *"The Merak"* (1965) 2 W.L.R. 250, 276 (C.A.).

decision of Roskill J. may be referred to. There the defendants, by a bill of lading dated November 16, 1954, acknowledged the shipment on board their vessel at Liverpool of 183 drums of electric cable for carriage to and delivery at Buenaventura. The bill of lading included the terms that "this bill of lading shall be governed by English Law to the exclusion of proceedings in the courts of any other country" and that "where the country of the port or place of shipment of the goods is Great Britain. . . this bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act, 1924". On December 12, 1954, the electric cable was delivered in a damaged condition at its destination. The owners of the cable, the telephone company, were paid by the insúrance company the sum of 73,228.90 Colombian pesos under a policy of insurance and on payment assigned to the insurance company all their rights to recover damages from third parties liable for the damaged condition of the electric cable. On November 2, 1955, Bernardo Isaza, as the assignee of the insurance company's rights of action against the defendants, started proceedings in the Supreme Court of New York against the defendants for the recovery of damages. Although Bernardo Isaza was acting for the insurance company that company had, in fact, never assigned their rights to him. On November 5, 1955, the defendants' agents received written notice from the insurance company of the assignment by the telephone company to the insurance company of its rights of action to recover damages from third parties. On May 16, 1956, the action in New York was dismissed on the ground that the court had no jurisdiction to determine the matter.

On January 7, 1960, the insurance ccmpany issued a writ in England to recover damages against the defendants and, cn February 8, 1960, an order was made that two preliminary issues should be tried : (*1*) whether or not the insurance company was entitled to sue upon the bill of lading, and, if so, (*2*) whether or not the insurance company's claim was barred by reason of Article III, rule 6, of the Rules scheduled to the Carriage of Goods by Sea Act, 1924. On February 21, 1960, the telephone company issued a writ to recover damages against the defendants and, subsequently, it was ordered that similar preliminary issues should be tried in that action.

In that case Roskill J. observed :

"I think the true proposition in English law is that where in an action in the English courts the plaintiff seeks relief and the defendant pleads limitation, the issue which an English court has to determine is whether the action before the court, and not some other action, has been instituted within the relevant limitation period(9).

In a still more recent case Russell L.J. said with reference to Rule 6 : "This rule derives from an international code designed in part to safeguard holders of bills of lading. It provides a short period of limitation. The field in which it operates is one in which resort to

(9 *Compania Colombiana* v. *Pacific S. N. Co.*, (1964) 2 W.L.R. 484, 503.

arbitration was and is a very common method of pursuing claims against the carrier. The English statute is applicable to outward bills of lading, and the phrase "suit is brought" is referable to something which may happen in many different jurisdictions with varying methods of moving to enforce contractual claims. To take the first step—for example by appointing an arbitrator—under an arbitration clause is to set in motion proceedings designed to obtain a decision, and which will, if pursued, inevitably lead to a decision, with resort at all stages to a court of law to ensure this. In my judgment the phrase should be construed as extending to and embracing such a step, and not limited to the initiation of proceedings in an ordinary court of law. I would not follow the decision in the *Son Shipping Case** in the United States of America(10)."

ARTICLE IV

RIGHTS AND IMMUNITIES

Article IV is another important Article and it deals with "rights" and "immunities" and provides :

"1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their receipt, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(*a*) Act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship ;

(*b*) Fire, unless caused by the actual fault or privity of the carrier ;

(*c*) Perils, dangers and accidents of the sea or other navigable waters ;

(*d*) Act of God ;

(*e*) Act of War ;

(*f*) Act of public enemies ;

*(1952) 199 Fed. Rep. 2nd ed., p. 687.

It may be noted that agreements to amend or modernise certain provisions of the Hague Rules, and particularly Article III, paragraphs 4, 6 and 8, and Article 10, have been recently entered into by several countries other than India. They have yet to become effective, and as such they are not being mentioned here.

(10) *The Merak*, (1965) 2 W.L.R. 250, 276 (C.A.).

(*g*) Arrest or restraint of princes, rulers or people, or seizure under legal process ;
(*h*) Quarantine restrictions ;
(*i*) Act or omission of the shipper or owner of the goods, his agent or representative ;
(*j*) Strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general ;
(*k*) Riots and civil commotions ;
(*l*) Saving or attempting to save life or property at sea ;
(*m*) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods ;
(*n*) Insufficiency of packing ; ,
(*o*) Insufficiency or inadequacy of marks ;
(*p*) Latent defects not discoverable by due diligence ;
(*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure abovenamed.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the

shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, that may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any."

Further to what has already been said(11) the following observations may be made.

EXTENT OF CARRIER'S EXEMPTION FROM LIABILITY

The net effect of Rule 1 of this Article read with Art. III, R. 1, seems to be that the carrier is liable for loss or damage resulting from unseaworthiness, unless he can prove that he exercised due diligence before and at the beginning of the voyage to make the ship seaworthy. The exemption in this Rule as well as in Art. IV, Rules 2 and 5, seems to have been extended to the ship in order to make it clear that it was intended to benefit the shipowners even though they were not parties to the contract of carriage and also to make it clear that the exemption applied in actions in rem. The protection given would seem to excuse only against latent defects(12). When the shipowner puts his ship into the hands of third parties for repair, the same considerations do not apply as in the case where a ship is built for him or newly comes into his hands by purchase(13). The damage must follow, from the unseaworthiness, according to the usual course of things(14).

Leesh River Tea Co. v. *B.I.S.N.*

With reference to Article III, R. 1(a), and Article IV, Rr. 1, 2(a), (c) and (q) it will be useful to refer to a very recent decision(15). There the plaintiffs consigned chests of tea on the defendants' vessel for shipment from Calcutta to London, Hull and Amsterdam via Colombo and Port Sudan. The tea was properly and carefully loaded and stowed in No. 2 hold on board the ship. While the vessel was at Port Sudan it discharged other cargo and loaded a cargo of cottonseed. The defen-

(11) See Lectures II-VII.
(12) *Smith Hogg* v. *Black Sea,* (1940) A.C. 997, 1001 (per Lord Wright).
(13) *Riverstone* v. *Lancashire,* (1961) 2 W.L.R. 269 H.L. at pp. 279 (per Viscount Simonds), 301 (per Lord Radcliffe) and 304 (per Lord Keith of Avonholm). This decision reversed the decision of McNair J. reported in (1958) 3 W.L.R. 482 and of the Court of Appeal reported in (1960) 2 W.L.R. 86, and explained the dicta of Lord Wright in *Angliss* v. *P. & O.,* (1927) 2 K.B. 456 and *Wilson & Clyde Coal Co.* v. *English,* (1938) A.C. 57.
(14) *Monarch S. S. Co.* v. *Karlshamns,* (1949) A.C. 196, 233 (per Lord du Pareq).
(15) *Leesh River Tea Co.* v. *B. I. S. N.,* (1966) 3 W.L.R. 642 C.A.

dants employed a local firm of stevedores for the discharge and loading of cargo at Port Sudan. One or more of the stevedores removed and stole in the course of the discharge or loading a small brass plate which was the cover plate of a storm valve in the area of No. 2 hold. The removal of the cover plate enabled seawater to enter the hold through the storm valve and the vessel was accordingly unseaworthy from the time it left Port Sudan and remained unseaworthy for the remainder of the voyage. The vessel encountered heavy weather for part of the remainder of the voyage and seawater entered the hold through the storm valve, as a result of which the tea was damaged. Neither the ship's officers nor crew could reasonably have detected the absence of the cover plate. In an action by the plaintiffs, suing as holders of bills of lading incorporating the rules scheduled to the Indian Carriage of Goods by Sea Act, 1925, against the defendants for damages in respect of the damaged tea, McNair J. held that the defendants could not rely on any of the immunities contained in Article IV of the Schedule to the Act of 1925 and he accordingly awarded the plaintiffs £1,835 8s. 2d. damages. On appeal by the defendants, it was held allowing the appeal, (*1*) that the defendants were not entitled to rely on the immunity in Article IV(1) of the Schedule to the Carriage of Goods by Sea Act, 1925, exempting them from loss or damage arising from unseaworthiness, because that immunity was confined to unseaworthiness arising before or at the beginning of the voyage and did not cover unseaworthiness arising, as here, in the course of the voyage;

(*2*) that the defendants were not entitled to rely on the immunity in Article IV(2)(a) of the Schedule to the Act of 1925 because, even if the stevedores could be regarded as the shipowners' servants for the purpose of Article IV(2)(a), the theft of the cover plate was not an act, neglect or default in the management of the ship;

(*3*) but that the defendants were entitled to rely on the immunity in Article IV(2)(q) of the Schedule to the Act of 1925, for the stevedore or stevedores who stole the plate were not agents or servants of the shipowners when they stole the plate, since the theft of the plate (part of the ship) was in no way incidental to or a hazard of the process of discharge and loading of the cargo which they were employed to handle but was an act quite unconnected with the cargo and so outside the course of their employment; accordingly, the defendants were not liable for the damage to the tea and the plaintiffs' action failed.

NAVIGATION

MANAGEMENT

The word "navigation" in Article IV, R. 2(a) refers to matters done in the handling of the ship when she is under way(16), and the word "management" has no precise legal meaning(17).

(16) *Svenssons* v. *Cliffe S. S. Co.*, (1932) 1 K.B. 490, 500 (per Wright J.).
(17) *Suzuki* v. *Beynon*, (1926) 42 T.L.R. 269, 274 (per Lord Sumner).

PERILS OF THE SEA

The phrase "perils of the sea" in Article IV. R.2(c) seems to be used much as the expression "dangers of the streets" is used. The latter expression refers to dangers which are peculiarly incident to being in or passing along the streets. Hence one must take into account not only the waves and waters, but also the storms, the shoals, and coasts, and the other various obstacles, fixed and moving, which form the peculiar vicissitudes of navigating the seas. Rain is not a peril of the sea, but at most a peril on the sea(18). It has no peculiar connection with the sea or the navigation. The expression "perils of the sea" has the same meaning in policies of insurance and contracts of carriage and the rule of looking to the proximate cause applies in relation to both(19).

ACT OF GOD

The exception "act of God" in R. 1(d) covers any accident due to natural causes directly and exclusively without human intervention, which no reasonable foresight could have avoided(20). Thus, damage by lightning or storm may be within the exception, whereas an accident arising from the navigation of a vessel in a fog would not be so, because partly due to human intervention(21).

ACT OF WAR

As regards "act of War" in R. 2(e), it has been held to include a state of hostilities between governments although diplomatic relations have not been served(22). The phrase "act of War" would presumably cover acts done in civil war(23).

RESTRAINT OF PRINCES OR RULERS

The phrase "restraint of princes or rulers" in Rule 2(g) includes any acts done, even in time of peace, by the sovereign power of the State where the ship may happen to be, and covers quarantine regulations, embargoes and seizures of contraband goods. The exception excuses the shipowner from his obligation to deliver at the port of destination

(18) *Canada* v. *Union Marine*, (1941) A.C. 55, 64 (per Lord Wright).

(19) *The Xantho*, (1887) 12 A.C. 503 ; *Hamilton* v. *Pandorf*, (1887) 12 A.C. 518.

(20) *Nugent* v. *Smith*, (1876) 1 C.P.D. 423, 444 (per Mellish L.J.) ; *Chogemull* v. *C.P.C.*, I.L.R. 18 C. 427, 439.

(21) *Liver Alkali Co.* v. *Johnson*, (1874) 9 Ex. 338. See *Esufali* v. *Thaha*, I.L.R. 47 M. 610.

(22) *Kawasaki Kisen* v. *Bantham S. S. Co.*, (1939) 2 K.B. 544, 556, 557 (per Greene M.R.) ; *Luigi* v. *Cechofracht*, (1956) 3 W.L.R. 480. As to "Warlike Operations" see *Yorkshire D. S. S. Co.* v. *Minister*, (1942) A.C. 691 ; *Larrinaga* v. *The King*, (1945) A.C. 246.

(23) *Curtis* v. *Mathews*, (1919) 1 K.B. 425 ; *Pesquerias* v. *Beer*, (1949) 1 All E.R. 845.

where to do so would expose the ship to danger of seizure(24). The exception will protect the shipowner from liability, although the restraint may affect his person and not the ship. "Restraint of princes or rulers" means the act of a State or government interfering with a strong hand, and not the judgment of any judicial court(25), but is not confined to the restraints of the sovereign power of the carrier's country.

The closing of the Dardanelles by the Turkish Government during the first World War or the recent blockade of Suez Canal in November 1956 following in the wake of the announcement of the nationalisation of the Canal by President Nasser of Egypt is an instance of "restraint of princes or rulers".

But when goods have been taken from a ship under process of the tribunals of the port at the instance of one who claims to be entitled to them, that is not an act of government within the exception.

RIOTS

CIVIL COMMOTION

In R. 2(k) the word "riots" is used to mean "riots" in the strict sense of the criminal law(26), and the expression "civil commotion" means an insurrection of the people for general purposes though it may not amount to a rebellion(27) : it is a stage between a riot and a civil war(28). The element of turbulence or tumult is essential, but it is not necessary to show the existence of any outside organisation at whose instigation the acts were done(29). The carrier will be protected only if the disturbance actually causes the loss or damage in question(30).

VICE

"Vice" in R. 2(m) means that which by its internal development tends to the destruction or the injury of the animal or thing to be carried, and which is likely to lead to such result(31). If the ordinary consequences have been aggravated by the manner in which the goods have been stowed in the ship, the shipowner is responsible(32).

INSUFFICIENCY OR INADEQUACY OF MARKS

About "insufficiency or inadequacy of marks" in R. 2(o) the cases of

(24) *Nobel's Explosives Co.* v. *Jenkins*, (1896) 2 K.B. 326 ; *Becker, Gray* v. *London Assurance*, (1918) A.C. 101, 114, 115 (per Lord Sumner). See also *Furness, Withy & Co.* v. *R. Banco*, (1917) 2 K.B. 873, 877 ; *Rickards* v. *Forestal Co.*, (1942) A.C. 50, 81, 82 ; *Atlantic Maritime* v. *Gibbon*, (1954) 1 Q.B. 88.
(25) *Finlay* v. *Liverpool S. S. Co.*, (1870) 23 L.T. 251, 254.
(26) *London & Lancashire* v. *Bolands*, (1924) A.C. 886.
(27) *Longdale* v. *Mason*, (1780) 2 Marshall (2nd) 791, 794.
(28) *Bolivia* v. *Indemnity Mutual*, (1909) 1 K.B. 785, 801 (per Farwell L.J.).
(29) *Levy* v. *Assicurazioni Generali*, (1940) A.C. 791, 800 (per Luxmoore L.J.).
(30) *Smith* v. *Rasario*, (1894) 1 Q.B. 174.
(31) *Blower* v. *G. W. Ry.*, (1872) L.R. 7 C.P. 655, 662, (per Willes J.). See also *Bradley* v. *Federal S. N. Co.*, (1926) 24 Ll.L.R. 446 ; *Greenshields* v. *Stephens*, (1908) A.C. 431, 435 (per Earl of Halsbury).
(32) *The Freedom*, (1871) L.R. 3 P.C. 594, 603 (per Sir J. Napier).

Sandeman v. *Tyzack etc. Co.*(33) and *Parsons* v. *New Zealand Shipping Co.*(34) already dealt with in Lectures II and VII may be usefully referred to.

LATENT DEFECTS

In R. 2(p) the phrase "latent defects" seems to refer to defects in the ship which could not be discovered by a person of competent skill using ordinary care. The words "not discoverable by due diligence" do not seem to add anything to the phrase "latent defects", unless the latter bears a wider meaning and refers also to something which is independent of the ship, *e.g.*, a shore crane.

The exception embodied in R. 2(q) should be interpreted as being *ejusdem generis* as the exceptions from (*a*) to (*p*), provided there is any genus which would embrace all the exceptions. But it is difficult to imagine any genus which would embrace them all, and therefore, it seems necessary to give these words the wider interpretation and thus to exclude the responsibility of the carrier in all cases where neither he nor his servants are at fault(35).

Now, Rule 3 cannot be contracted out of where the Rules are incorporated into the bill of lading by Section 1 of the Carriage of Goods by Sea Act. But where the Rules are incorporated only by contract an express provision in the bill of lading conflicting with this rule would probably be given effect to(36). It should be noted that there is no rule in Art. IV equivalent to Art. III, r. 8. The shipper cannot surrender his rights. Art. V permits only the carrier to do so.

Whether or not a particular deviation is reasonable is a question of fact in each case. The onus probandi in a case of alleged deviation follows this rule : when the cargo-owner proves the loss the carrier relies upon an immunity, and when the cargo-owner then establishes a deviation the carrier must show that the deviation was authorised by this rule. In general, an express liberty to deviate in the bill of lading is not affected by the Rules. But an unnecessary deviation, for the sole benefit of the carrier, is unreasonable.

DEVIATION

Rule 4 speaks of "deviation"—a topic which has already been touched upon(37) and will be considered again with reference to the Indian Marine Insurance Act XI of 1963.

(33) (1913) A.C. 680.
(34) (1901) 1 K.B. 548.
(35) Scrutton, 17th ed., p. 424 ; *Malabar Steamship* v. *Hossein*, (1950) 55 C.W.N. 10 ; *Leesh River Tea Co.* v. *B.I.S.N.*, (1966) 3 W.L.R. 642 C.A.
(36) *Varnish* v. *Kheti*, (1949) 82 Ll.L.R. 525.
(37) See Lecture II.

PACKAGE

UNIT

Rule 5 requires that the nature and value of the goods must be inserted in the bill of lading as well as declared before shipment if the carrier's liability is to exceed £100 per package(38). "Package" does not include an unboxed motor vehicle(39). "Unit" probably will include it. "Unit" seems to mean the unit of enumeration or measurement shown in the bill of lading as provided by Art. III, R. 3(b)(40).

Stevedores engaged by a carrier cannot rely on the bill of lading to limit their liability in tort under Rule 5(41). But in an American case(42) a U.S. District Court held that parties to a bill of lading could extend a contractual benefit to a third party by clearly expressing their intent to do so.

DANGEROUS CARGO

Rule 6 refers to "dangerous cargo", but it must be borne in mind that the Schedule to the Act does not contain a complete code, and in case of damage resulting from the shipment of dangerous cargo with the knowledge and consent of the master the shipowner can recover damages from the shipper if his contract, apart from the Act, enables him to do so(43).

ARTICLE V

SURRENDER OF RIGHTS AND IMMUNITIES, AND INCREASE OF RESPONSIBILITIES AND LIABILITIES

The first part of Article V negatives the effect of Section 1 of the Act and Art. II of the Rules, which have the effect that the carrier shall by statute have the rights and immunities set forth in the Rules. It is to be contrasted with Art. III, r. 8, which expressly prevents him from lessening his liability under the Rules. But the surrender must be clearly stated in the bill of lading.

Regarding the second part of this Article it seems that there is nothing in the Act or the Rules to compel the shipowner to issue to a charterer a bill of lading in the form required by Art. III, r. 3, but where a bill of lading is actually issued to a charterer he may demand compliance with the said Rule.

The reference to "lawful provision regarding general average" in the concluding part of this Article seems to be to Rule D of the York-Antwerp Rules, 1950.

(38) *Pendle and Rivet* v. *Ellerman Lines*, (1927) 33 Com. Cas. 70, 78, 79 (per Mackinnon J.).
(39) *Studebaker* v. *Charlton S. S. Co.*, (1938) 1 K.B. 459, 467 (per Goddard J.).
(40) Scrutton on *Charterparties*, 17th ed., p. 427.
(41) *Midland Silicones* v. *Scruttons Ltd.*, (1962) A.C. 446 H.L.
(42) *Carle & Montanari* v. *American Export*, (1968) 1 Lloyds' Rep. 260.
(43) *Chandris* v. *Isbrandtsen-Moller*, (1951) 1 K.B. 240.

ARTICLE VI

SPECIAL CONDITIONS

Article VI in effect contains provisions for contracting out of the Rules. The words "to which the Rules apply" in Section 3 may mean "to which the Rules other than Art: VI apply." This Article is not exhaustive. There are contracts of affreightment in which, according to the custom of the trade and intention of the parties, a bill of lading plays no part and is never used. To such contracts the Act and the Rules have no application(44).

ARTICLE VII

LIMITATIONS ON THE APPLICATIONS OF THE RULES

Article VII, which deals with limitations on the application of the Rules, runs as follows :

> Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exception as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

ARTICLE VIII

LIMITATION OF LIABILITY

> Article VIII, dealing with limitation of liability, states :
> The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.
> Articles VII and VIII do not require any special comment.

ARTICLE IX

Article IX says that the monetary units mentioned in these Rules are to be taken to be gold value.

Regarding Article IX, it has been felt that its construction is very difficult. Article IX can only refer to Article IV, R. 5, and Devlin J.'s following observations may be noted :

> "The defendants admit liability but claim that the amount is limited under Art. IV, R. 5 of the Hague Rules. The limit stated in that Rule is £100, but this is subject to Article IX which prescribes that the figure is to be taken to be gold value. There are doubts about the interpretation and effect of this latter Article, and they have been very sensibly resolved for the parties to this case by the acceptance

(44) *Harland and Wolff* v. *Burns*, (1931) 40 Ll.L.R. 286 ; *Vita Food Products* v. *Unus Shipping Co.*, (1939) A.C. 277, 294 ; *Canadian* v. *Canadian*, (1947) A.C. 46, 57.

of the British Maritime Law Association's Agreement of August 1, 1950, which fixes the limit at £200"(45).

GOLD CLAUSE AGREEMENT

The primary purpose of the British Maritime Law Association Agreement of August 1, 1950 (popularly known as the Gold Clause Agreement), which appears to have worked smoothly, is to deal with the difficulties presented by Article IX of the Schedule to the Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. V, c. 22). The probable effect of this Article, taken in conjunction with Article IV, Rule 5 of the said Schedule, is to make the maximum liability of the shipowner per package or unit the equivalent of "£100 gold", or, at present day values, considerably in excess of £300. All countries that have given effect by legislation to the Hague Rules of 1924 have not included a "gold value clause" and some that originally did so have amended their legislation subsequently. The Gold Clause Agreement by clause 2 substitutes a figure of "£200 sterling lawful money of the United Kingdom" for the "£100 gold" of the Rules and thus, on present values, effects a compromise between the conflicting views as to the legal effect of Article IV, Rule 5 and Article IX.

The other important features of the Gold Clause Agreement include extension of the period of limitation, application of the Hague Rules to certain bills of lading and provision for litigation or arbitration in the United Kingdom(46).

Apart from business considerations the Gold Clause Agreement cannot be legally enforced.

Regarding this Article IX and in respect of the sum inserted in Art. IV, R. 5, the Schedules to the English and Australian Acts are identical in form to the Schedule to this Act; but as regards Art. IV, R. 5, while the Irish Act speaks of £100 and the Canadian Act prescribes $500 (of lawful money of Canada), the New Zealand Act refers to £100 (of New Zealand Currency) and the Newfoundland Act lays down $500.

The American Act, *viz.*, the United States Carriage of Goods by Sea Act, 1936, contains no gold clause corresponding to Article IX.

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(45) *Pyrene* v. *Scindia Navigation*, (1954) 2 Q.B. 402, 413.
(46) Scrutton, 17th ed., p. 503.

LECTURE XII

MISCELLANEOUS STATUTORY PROVISIONS AFFECTING SHIPPING

In this lecture reference will be made to the relevant and important provisions only affecting shipping of such Indian Acts as—

(*1*) the Customs Act LII of 1962;
(*2*) the Calcutta Port Act, 1890;
(*3*) the Bombay Port Trust Act, 1879;
(*4*) the Madras Port Trust Act, 1905;
(*5*) the Stamp Act II of 1899;
(*6*) the Marine Insurance Act XI of 1963; and
(*7*) the Merchant Shipping Act XLIV of 1958.

(*1*) *The Customs Act LII of 1962.*—The Sea Customs Act of 1878 which lays down the basic law relating to customs was enacted more than 80 years ago, and it was amended from time to time. The Land Customs Act of 1924 was not a self-contained Act, and it applied by reference provisions of the Sea Customs Act of 1878 to land customs with certain modifications. The administration of air customs used to be governed by certain rules made under the Indian Aircraft Act. The Customs Act LII of 1962 was passed, repealing the whole of the said Acts of 1878 and 1924 and part of the Aircraft Act, and with the object of consolidating the provisions relating to sea customs, land customs and air customs into one comprehensive measure. It consists of seventeen chapters and 161 sections out of which reference may be made particularly to certain sections in chapters V, VI, VII, XII and XV only. The subject-matters of the relevant sections of these chapters, which need not be set out in detail, are as follows :

17. Assessment of duty.
29. Arrival of vessels and aircrafts in India.
30. Delivery of import manifest or import report.
31. Imported goods not to be unloaded from vessel until entry inwards granted.
32. Imported goods not to be unloaded unless mentioned in import manifest or import report.
33. Unloading and loading of goods at approved places only.
34. Goods not to be unloaded or loaded except under supervision of Customs Officer.
35. Restrictions on goods being waterborne.
36. Restrictions on unloading and loading of goods on holidays, etc.
37. Power to board conveyances.
38. Power to require production of documents and ask questions.

39. Export goods not to be loaded on vessel until entry outwards granted.
40. Export goods not to be loaded unless duly passed by proper officer.
41. Delivery of export manifest or export report.
42. No conveyance to leave without written order.
43. Exemption of certain classes of conveyances from certain provisions of this chapter.
45. Restrictions on custody and removal of imported goods.
46. Entry of goods on importation.
47. Clearance of goods for home consumption.
48. Procedure in case of goods not cleared, warehoused, or transhipped within two months after unloading.
49. Storage of imported goods in warehouse pending clearance.
50. Entry of goods for exportation.
51. Clearance of goods for exportation.
92. Entry of coastal goods.
93. Coastal goods not to be loaded until bill relating thereto is passed, etc.
94. Clearance of coastal goods at destination.
95. Master of coasting vessel to carry an advice book.
96. Loading and unloading of coastal goods at Customs port or coastal port only.
97. No coasting vessel to leave without written order.

160. Repeal & savings.—(*1*) The enactments specified in the Schedule* are hereby repealed to the extent mentioned in the fourth column thereof.

(*2*) In the Indian Tariff Act, 1934 (32 of 1934)—

(*a*) for section 2, the following section shall be substituted, namely,—

"2. *Duties specified in the Schedule to be levied.*—The rates at which duties of Customs shall be levied under the Customs Act, 1962, are specified in the First and Second Schedules";

(*b*) sections 5 and 6 shall stand repealed.

(*3*) Notwithstanding the repeal of any enactment by this section,—

(*a*) any notification, rule, regulation, order or notice issued or any appointment or declaration made or any licence, permission or exemption granted or any assessment made, confiscation adjudged or any duty levied or any penalty or fine imposed or any forfeiture, cancellation or discharge of any bond ordered or any

The Schedule.

Repeals.

(1) Year	(2) No.	(3) Short title	(4) Extent of Repeal
1878	8	The Sea Customs Act	The whole.
1896	8	The Inland Bonded Warehouses Act	Do.
1924	19	The Land Customs Act	Do.
1934	22	The Aircraft Act	Section 16.

other thing done or any other action taken under any repealed enactment shall, so far as it is not inconsistent with the provisions of this Act, be deemed to have done or taken under the corresponding provision of this Act;

(*b*) any document referring to any enactment hereby repealed shall be construed as referring to this Act or the corresponding provision of this Act.

(*4*) This Act shall apply to all goods which are subject to the control of Customs at the commencement of this Act notwithstanding that the goods were imported before such commencement.

(*5*) Where the period prescribed for any application, appeal, revision or other proceeding under any repealed enactment had expired on or before the commencement of this Act, nothing in this Act shall be construed as enabling any such application, appeal or revision to be made or a proceeding to be instituted under this Act by reason only of the fact that a longer period therefor is prescribed or provision is made for extension of time in suitable cases by the appropriate authority.

(*6*) The provisions of section 65 shall apply to goods warehoused before the commencement of this Act if the operations permissible under that section were carried on after such commencement.

(*7*) Any duty or penalty payable under any repealed enactment may be recovered in a manner provided under this Act but without prejudice to any action already taken for the recovery of such duty or penalty under the repealed enactment.

(*8*) The mention of particular matters in sub-section (*4*), (*5*), (*6*) and (*7*) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeals.

(*9*) Nothing in this Act shall affect any law for the time being in force relating to the constitution and powers of any Port authority in a major port as defined in the Indian Ports Act, 1908 (15 of 1908).

The Customs (Amendment) Act 12 of 1969 received the President's Assent on 28.3.69, and it is deemed to have come into force on 3.1.69.

The object of the Bill was as follows :

"Because of large scale smuggling of silver out of the country and of various consumer articles into the country, it has become necessary to make additional provisions in the Customs Act, 1962, so that smuggled goods and attempts at smuggling can be effectively and expeditiously dealt with. The object of the provisions of the Bill is to prevent smuggling by facilitating the detection and confiscation of goods smuggled into the country and goods sought to be smuggled out of the country."

Chapter IVA was introduced for detection of illegally imported goods and prevention of disposal thereof.

Chapter IVB was introduced for prevention or detention of illegal export of goods.

Chapter IVC was introduced for conferring power on authorised

customs officers to exempt goods from the operation of Chapters IVA & IVB.

If will be useful to refer in this connection to Sections 12 and 23A of the Foreign Exchange Regulation Act VII of 1947 and the application thereof to the Customs Act, 1962.

(2) *The Calcutta Port Act, 1890.*—Certain sections in Parts VIII and IX of this Act, which was passed to consolidate and amend the law relating to the Port of Calcutta, may be referred to now :

(*a*) PART VIII—LANDING AND SHIPMENT OF GOODS.

90. Commissioners to provide for landing etc. goods from sea-going vessels.
91. Commissioners to grant receipts for goods landed by them : Liability of ship for loss etc. of goods to cease when once landed.
92. Commissioners to declare when docks etc. are ready for landing goods from sea-going vessels.
93. Commissioners may order sea-going vessels to load or unload at docks etc. when accommodation available.
94. Penalty for landing or shipping goods in contravention of order.
95. Power to direct goods not to be landed from or shipped upon sea-going vessels save at docks etc. erected by Commissioners.
96. Penalty for landing or shipping goods after publication of order.
97. Commissioners to declare when docks etc. are ready for landing goods from inland vessels.
98. Suit may be instituted for award of compensation.
99. Goods not to be landed from inland vessels save at docks etc: Penalty for breach of provisions.

(*b*) PART IX—LEVYING TOOLS AND RATES.

103. Commissioners to frame scale of tolls etc. for landing goods from sea-going vessels.
104. Commissioners to frame scale of tolls etc. for landing goods into inland vessels.

112. Responsibility of Commissioners for loss, destruction or deterioration of animals or goods.
113. Commissioners to take charge of goods landed by them : Goods not stored in licensed warehouses to remain at risk and expense of owner if not removed within five days.
114. Commissioners to give notice to consignees etc. of cessation of liability, and also to publish notice of expiry of such liability.
115. Liability of consignee or owner with respect to goods stored in public warehouses.

116. Lien for freight preserved after landing of goods, if notice of lien be given : Goods to be retained in warehouses and sheds until discharge of lien.
117. Commissioners may permit goods to be removed without regard to lien.
118. Power of Commissioners to sell goods by public auction.

(3) *The Bombay Port Trust Act, 1879.*—This Act was passed with the same object in view for the Port of Bombay as the Calcutta Port Act, 1890, was passed for the Port of Calcutta. The following sections only of this Act may be referred to :—

POWERS AND FUNCTIONS OF THE BOARD.

61A. Board to take charge of goods landed : Goods not stored in licensed warehouses to remain at risk and expense of owner if not removed within seven days.
62. Lien for freight preserved after landing if notice be given.
63. Discharge of lien by payment or release.
64. If rates not paid or lien for freight not discharged, goods may be sold after two months.
64A. Disposal of goods not removed from the premises of the Board within time limited.

(4) *The Madras Port Trust Act, 1905.*—Like its Calcutta and Bombay counterparts, this Act had the same object in view and was passed for the Port of Madras. Certain sections of this Act may be noticed here :—

(*a*) CHAPTER V—WORKS AND SERVICES.

35. Board's power to execute works and provide appliances.
39. Performance of services by the Board.
40. Responsibility of Board for loss etc. of goods.
41. Responsibility of Board for loss etc. of animals or goods.

(*b*) CHAPTER VI—IMPOSITION AND RECOVERY OF RATES.

50. Time for payment of rates on goods.
51. Lien for rates.
53. Preservation of lien for freight after goods are landed.
54. Retention of such goods until lien is discharged.
55. Discharge of shipowner's lien for freight.
56. Sale of goods after two months if rates or rents are not paid or lien for freight is not discharged.

(5) *The Stamp Act II of 1899.*—Section 2(4) of this Act lays down that a "bill of lading" includes a "through bill of lading", but does not include a "mate's receipt."

And, according to Section 2(20), a "policy of sea-insurance" or "sea-policy"—

(*a*) means any insurance made upon any ship or vessel (whether for marine or inland navigation), or upon the machinery, or furniture of any ship or vessel, or upon any goods, merchandise or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in, or relating to, any ship or vessel; and

(*b*) includes any insurance of goods, merchandise or property for any transit which includes, not only a sea risk within the meaning of clause (*a*), but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance;

where any person in consideration of any sum of money paid or to be paid for additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise or property from any risk, loss or damage, such agreement or engagement shall be deemed to be a contract for sea-insurance.

Provisions in the Act about stamping bills of lading or policies of sea-insurance need not be referred to here.

(*6*) *The Marine Insurance Act XI of 1963.*—The law relating to marine insurance was codified in England by the Marine Insurance Act, 1906, and this Act came into force on January 1, 1907. The leading principles derived from judicial decisions and authoritative text-books were embodied in the Act.

The Marine Insurance Act, 1906, codifies only those principles of the law which relate exclusively to marine insurance and expressly enacts that the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, are to continue to apply to contracts of marine insurance.

In India, in the absence of any legislation relating to marine insurance, the Courts had followed the principles of English law, and English decisions based on such principles as well as the provisions of the Marine Insurance Act, 1906, until after Independence with the considerable expansion of Indian Shipping the need was sorely felt for having an Indian Act on the subject consistent with Indian conditions. Thereupon the Indian Marine Insurance Bill, 1959, was introduced in Parliament at New Delhi, referred to a Joint Committee of the Houses for report and ultimately passed and the President's assent to the Indian Marine Insurance Act was obtained on April 18, 1963.

The topics dealt with by the Indian Marine Insurance Act, 1963, which is substantially a reproduction of its English counterpart, *viz.*, the Marine Insurance Act, 1906, are arranged as shown below and follow closely the plan of the English Act :

(*1*) marine insurance (sections 3-5);

(*2*) insurable interest (sections 6-17);

(*3*) insurable value (section 18);
(*4*) disclosure and representations (sections 19-23);
(*5*) the policy (sections 24-33);
(*6*) double insurance (section 34);
(*7*) warranties etc. (sections 35-43);
(*8*) the voyage (sections 44-51);
(*9*) assignment of policy (sections 52-53);
(*10*) the premium (section 54);
(*11*) loss and abandonment (sections 55-63);
(*12*) partial losses [including salvage and general average and particular charges] (sections 64-66);
(*13*) measure of indemnity (sections 67-78);
(*14*) rights of insurer on payments (sections 79-81);
(*15*) return of premium (sections 82-84); and
(*16*) supplemental (sections 85-91).

The Indian Act came into force on August 1, 1963.

It is not necessary to set out any provisions of the Act of 1963 other than the following which relate to "the voyage" :—

44. Implied conditions as to commencement of risk.—(*1*) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.

(*2*) That implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

45. Alteration of port of departure.—Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach.

46. Sailing for different destination.—Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.

47. Change of voyage.—(*1*) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

(*2*) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

48. Deviation.—(*1*) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(*2*) There is a deviation from the voyage contemplated by the policy—

(*a*) Where the course of the voyage is specifically designated by the policy, and that course is departed from ; or

(*b*) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(*3*) The intention to deviate is immaterial ; there must be a deviation in fact to discharge the insurer from his liability under the contract.

49. Several ports of discharge.—(*1*) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not, there is a deviation.

(*2*) Where the policy is to "ports of discharge", within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not, there is a deviation.

50. Delay in voyage.—In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.

51. Excuse for deviation or delay.—(*1*) Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

(*a*) where authorised by any special term in the policy ; or

(*b*) where caused by circumstances beyond the control of the master and his employer ; or

(*c*) where reasonably necessary in order to comply with an express or implied warranty ; or

(*d*) where reasonably necessary for the safety of the ship or subject-matter insured ; or

(*e*) for the purpose of saving human life or aiding a ship in distress where human life may be in danger ; or

(*f*) where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship ; or

(*g*) where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(*2*) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch.

(*7*) *The Merchant Shipping Act XLIV of 1958.*—The English common law relating to shipping has been largely superseded by statute and

subordinate legislation. The same remark applies to the law relating to shipping as administered by the Courts in India. The consolidating English Act, viz. the Merchant Shipping Act of 1894, and certain other Acts of English merchant shipping legislation, including the Merchant Shipping (Mercantile Marine Fund) Act of 1898, the Merchant Shipping (Liability of Shipowners and others) Act of 1900, the Maritime Conventions Act of 1911 and the Merchant Shipping (Safety and Load Line Conventions) Act of 1932 have ceased to have any force or effect in India since the enactment of the Indian Merchant Shipping Act XLIV of 1958. Those English statutes, in so far as they extended to or operated as part of the law of India were expressly repealed by the said Indian Act XLIV of 1958.

Act XLIV of 1958 consists of 461 sections only and was originally divided into eighteen parts dealing with the subjects noted below :

1. Preliminary (Sections 1-3) ;
2. National Shipping Board (Sections 4-6) ;
3. General Administration (Sections 7-13) ;
4. Shipping Development Fund (Sections 14-19) ;
5. Registration of Indian Ships (Sections 20-74) ;
6. Certificates of Officers (Sections 75-87) ;
7. Seamen and Apprentices (Sections 88-218) ;
8. Passenger Ships (Sections 219-282) ;
9. Safety (Sections 283-344) ;
10. Collisions, Accidents at Sea and Limitation of Liability (Sections 345-352) ;
11. Navigation (Sections 353-356) ;
12. Investigations and Enquiries (Sections 357-389) ;
13. Wreck and Salvage (Sections 390-404) ;
14. Control of Indian Ships and Ships Engaged in Coasting Trade (Sections 405-414) ;
15. Sailing Vessels (Sections 415-435) ;
16. Penalties and Procedure (Sections 436-448) :
17. Miscellaneous (Sections 449-460) ; and
18. Repeals and Savings (Section 461).

Certain necessary amendments to Act XLIV of 1958 were introduced by the *Amending Act XXI of 1966* which inserted a new Part IXA consisting of Sections 344A to 344I after Part IX of the Act of 1958 to deal with "Nuclear Ships". But divers matters connected with shipping, such as bills of lading and charterparties, marine insurance, general average and the Hague Rules and legislation based on such Rules are not included within the scope of the Act of 1958.

The carriage of passengers by sea is, as was mentioned in the first Lecture, of far less importance to the shipping industry than the carriage of goods. So it is not necessary to dwell at length on the provisions of Part 8 about "passenger ships", or with those of Part 9 about "safety".

It will be enough to mention that Part 8 applies only to sea-going

passenger ships fitted with mechanical means of propulsion, but the provisions of this Part relating to unberthed passenger ships shall not apply—

(*a*) to any such ship not carrying more than thirty unberthed passengers ; or

(*b*) to any such ship not intended to carry unberthed passengers to or from any port or place in India.

And Part 8 deals with—

(*1*) survey of passenger ships (Sections 219-232) ;
(*2*) keeping order in passenger ships (Sections 233-236) ;
(*3*) unberthed passenger ships and pilgrim ships (Sections 237-254) ; and
(*4*) special provisions relating to unberthed passenger ships (Sections 255-282) .

Part 9 contains legislation regarding the safety of life and property at sea and gives effect to the International Convention respecting Load Lines, 1930, and the International Convention for the Safety of Life at Sea, 1948, and some of the sections included in this Part have been amended and a few fresh sections have been inserted by the Merchant Shipping (Amendment) Act XXI of 1966 to meet the requirements of the International Convention for the Safety of Life at Sea, 1960. It is, however, not necessary to go into details here; and it will be enough to point out that life-saving appliances include life-boats, life-rafts, life-jackets, life-buoys and radio installation for radio telegraph service or radio telephone service. Furthermore, Section 310(2) exempts certain ships from provisions relating to load lines, and sub-section (7) of Section 323 enacts that for the purposes of that section a ship shall be deemed to be loaded beyond the limit allowed by the certificate if she is so loaded as to submerge in salt water, when the ship has no list, the appropriate load line on each side of the ship, that is to say, the load line appearing in the certificate to indicate the maximum depth to which the ship is for the time being entitled under the Load Line Convention to be loaded.

LECTURE XIII

ADMIRALTY JURISDICTION OF INDIAN CHARTERED HIGH COURTS

The word "Admiralty" is 'formed from "admiral"; that word, in turn, derives from an Arabic phrase, *amir-al*, meaning "ruler of the . . ." Apparently common in the nomenclature of Arab officialdom in the Middle Ages, this phrase often (though not exclusively) occurred in expressions denoting maritime officers, such as *amir-al-ma,* "ruler of the water", and *amir-al-bahr,* "ruler of the sea." European Christians, taking the truncated phrase, *amir-al*, for an independent word, adopted it (in many disguises : *"amiralis,"* etc.) to designate any high official, but ultimately borrowed the specialized use just mentioned, without taking over the final element—*bahr* or *ma.* The word was meanwhile reshaped, both as to spelling and pronunciation, on false analogy with words in the etymological family of the Latin verb *admirare* : "admire," "admiration." etc.,'(1).

The origin and the extent of the Admiralty Jurisdiction of the Calcutta High Court (which are the same as those of the High Courts of Bombay and Madras) were discussed at length by his Lordship P. B. Mukharji J. in the course of a judgment(2) as follows :—

"The Admiralty Jurisdiction in this High Court is an ancient inheritance. Clause 26 of the Charter of 1774 defines the Admiralty Jurisdiction of the Supreme Court. It made the Supreme Court of Judicature at Fort William in Bengal, the Court of Admiralty, in and for the provinces, countries or districts, of Bengal, Behar and Orissa, and all other territories and islands adjacent thereunto. It gave power to the Supreme Court to hear, examine, try and determine and take cognizance of all causes, civil and maritime, and 'all pleas of contracts', and

'all matters and contracts which in any manner whatsoever relate to freight or money due for ships hired and let out, transport-money, maritime usury or bottomry or to extortions, trespasses, injuries, complaints, demands, and matters, civil and maritime, whatsoever, between merchants, owners and proprietors of ships and vessels, employed or used within the jurisdiction or between others contracted, done, had, or commenced, in, upon or by the sea, or public rivers, or ports.'

"This clause describes the admiralty jurisdiction of the Supreme Court

(1) Gilmore and Black on *The Law of Admiralty,* ed. 1957 p. 1.
(2) *Jayaswal Shipping Co.* v. *SS Leelawati,* A.I.R. 1954 Cal. 415 (claim for necessaries).

'as the same is used and exercised in that part of Great Britain called England, together with all and singular their incidents, emergents and dependencies annexed'.

"This inheritance was continued by Cl. 31 of the Letters Patent of 1862 which in its turn was continued by Cl. 32 of the Letters Patent of 1865. Section 106 of the Government of India Act, 1915, continued the existing Admiralty Jurisdiction in the High Courts in India. It was preserved by S. 223 of the Government of India Act, 1935, and its adaptations. Finally, Art. 225 of the Constitution of India lays down that the jurisdiction of any existing High Court shall be the same as immediately before the commencement of the Constitution subject, of course, to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by the Constitution. No such Legislature since the Constitution has made any law touching the Admiralty Jurisdiction of this Court on the point under consideration. That is a brief account of how the present High Court in Calcutta is vested with the Admiralty Jurisdiction. As this survey will show, the *fens et erige* of this High Court's Admiralty Jurisdiction remains Cl. 26 of the Charter of the Supreme Court of 1774.

In order, therefore, to determine the nature, scope and extent of Admiralty Jurisdiction of the High Court in Calcutta, the words of Cl. 26 of the Charter of 1774 are material. As already indicated, Cl. 26 of the Charter of 1774 in short gives the jurisdiction of the Admiralty

'as the same is used and exercised in that part of Great Britain called England together with all and singular their incidents.'

"This again makes it necessary to examine the basis and scope of the Admiralty Jurisdiction exercised by the Court of Admiralty in England. The Admiralty Jurisdiction in England is of great antiquity. In England, the Court of the Lord High Admiral as a Corollary to the criminal jurisdiction which it possessed, began to hear disputes also in civil matters connected with the sea and gradually usurped the jurisdiction over cases arising in inland tidal waters.

"Then began the conflict between the usurping authority of the Court of the Lord High Admiral and the existing Courts of Common Law. As a result of this encroachment on the province of the Courts of Common Law, two statutes were passed in the reign of Richard II to limit the jurisdiction of this new authority. In Art. 93, Vol. I of Hailsham's Edition* of Halsbury's *Laws of England* it is expressly pointed out :

'the civil jurisdiction of the Admiralty continued within the limits laid down by the statutes of Richard II, but its exercise from the reign of Elizabeth I to the reign of Charles II involved the

*See now Art. 87, p. 47, Simonds ed., Vol. I.

Admiralty Court in a long struggle with the superior Courts of Common Law'.

"The ultimate result of this conflict led to the Civil Jurisdiction of the Admiralty Court being considerably narrowed and curtailed in practice and it appears that the jurisdiction of the Admiralty was confined to (*1*) collisions between the ships, (*2*) injurious acts committed on the high seas outside the body of any county, (*3*) salvage service rendered to property on the high seas and between high and low water mark, but otherwise not within the body of any county, (*4*) droits of Admiralty, (*5*) possession of ships where no title was in question, (*6*) bottomry, so called because money had been lent on the security of the bottom of the ship, (*7*) respondentia bonds on cargo, (*8*) claims of seamen's wages where there had been no pirates, (*9*) jurisdiction over the goods of pirates and goods partially taken, and (*10*) suits against masters of ships for assaults and battery committed on the high seas where the complainants were officers, seamen or passengers of the ships. From this list it will appear that a claim for necessaries supplied to a ship did not form an expressly mentioned part of Admiralty jurisdiction in England. How far a claim for necessaries supplied to a ship came within the Admiralty Jurisdiction, therefore, requires a special treatment.

"Although from time to time the Court of Admiralty in England claimed jurisdiction over actions for necessaries, the validity of such claim was debatable. This doubtful legal position is cautiously described in Art. 93 of the First Volume of Hailsham's Edition** of Halsbury's *Laws of England* :

'actions in respect of necessaries supplied on the high seas and for towage on the high seas seem also to have been within the jurisdiction, but seldom, if ever, occurred in practice',

"In the Fifth Edition of Roscoe's Admiralty Jurisdisction and Practice at page 202 the legal position is clarified by the statement :

'although from time to time the Court of Admiralty claimed a jurisdiction over actions for necessaries, it was decided once for all in *William Hodges* v. *Jacob Sims,* (1835) 3 Knapp 94, that it did not possess it. By the Admiralty Court Act, 1840 (3 & 4 Vict., Chap. 65, S. 6) the Court of Admiralty acquired jurisdiction over claims for necessaries supplied to any foreign ship or sea-going vessel' "(2).

The English Admiralty Court Act of 1840 was followed by the English Admiralty Court Act of 1861, which provided, inter alia, as follows in Sections 4, 5, 6 and 35 :—

4. The High Court of Admiralty shall have Jurisdiction over any claim for the building, equipping, or repairing of any Ship, if at the

**See now Art. 87, p. 47, Simonds ed., Vol. I.

(2) *Jayaswal Shipping Co.* v. *S. S. Leelawati,* A.I.R. 1954 Cal. 415.

Time of the Institution of the Cause the Ship or the Proceeds thereof are under Arrest of the Court.

5. The High Court of Admiralty shall have jurisdiction over any Claim for Necessaries supplied to any Ship elsewhere than in the Port to which the Ship belongs, unless it is shown to the Satisfaction of the Court that at the Time of the Institution of the Cause any Owner or Part Owner of the Ship is domiciled in England or Wales.

6. The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading or any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales; provided always, that if in any such case the plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the Judge shall certify that the cause was to be a fit one to be tried in the said Court.

. . . . . .

35. The Jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam.

The rule of the Common Law was that the Court of Admiralty had no jurisdiction over a cause for necessaries supplied to a ship at home : that belonged to the Court of Common Law. Then it was enacted that the Court of Admiralty should have jurisdiction over a claim for necessaries supplied to any ship elsewhere than at the Port to which the ship belongs. That seems clearly enough to enact that the Admiralty Court shall have jurisdiction when the necessaries are supplied in England, just as if they have been supplied abroad; but then it is added; unless it is shown to the Court that the owner be domiciled in England; but that must be alleged and proved to the satisfaction of the Court before judgment; and it is too late afterwards(3).

Therefore, the requirements which had to be fulfilled to attract the jurisdiction of the High Court of Admiralty in England were—

(*a*) that in respect of any claim for building, equipping or repairing a ship, the ship or the proceeds thereof had to be under arrest of Court at the time of the institution of the cause; and

(*b*) that in respect of any claim for necessaries supplied to any ship—

(*i*) the supply must have been made elsewhere than in the port to which the ship belonged, and

(*ii*) at the time of the institution of the cause no owner or part-owner of the ship was domiciled in England or Wales.

(3) *Exparte Michael* (1872) 7 Q.B. 658, 660 (per Blackburn J.).

The English Vice Admiralty Courts Act, 1863, was enacted to facilitate the appointment of Vice Admirals and of officers in Vice Admiralty Courts in British possessions abroad excluding India, conferring jurisdiction upon such Vice Admiralty Courts in respect of the following matters :

(*1*) Claims for Seamen's Wages ;
(*2*) Claims for Master's Wages, and for his Disbursements on account of the Ship ;
(*3*) Claims in respect of Pilotage ;
(*4*) Claims in respect of Salvage of any Ship, or of Life or Goods therefrom ;
(*5*) Claims in respect of Towage ;
(*6*) Claims for Damage done by any Ship ;
(*7*) Claims in respect of Bottomry or Respondentia Bonds ;
(*8*) Claims in respect of any Mortgage where the Ship has been sold by a Decree of the Vice Admiralty Court, and the Proceeds are under its Control ;
(*9*) Claims between the Owners of any Ship registered, in the Possession in which the Court is established, touching, the Ownership, Possession, Employment or Earnings of such Ship ;
(*10*) Claims for Necessaries supplied, in the Possession in which the Court is established, to any Ship of which no Owner or Part-Owner is domiciled within the Possession at the Time of the Necessaries being supplied ;
(*11*) Claims in respect of the building, equipping, or repairing within any British Possession of any Ship of which no Owner or Part-Owner is domiciled within the Possession at the Time of the Work being done.

This Act of 1863 had no application to India and so any further reference to it is unnecessary.

On July 25, 1890, the Colonial Courts of Admiralty Act, 1890, was enacted by the British Parliament to amend the law respecting the exercise of Admiralty jurisdiction in British Dominions and elsewhere out of the United Kingdom. This Act came into force in every British possession on July 1, 1891, and the following provisions thereof deserve notice :

2. (*1*) Every court of law in a British possession, which is for the time being declared in pursuance of the Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such court in reference to jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession

the Governor is the sole judicial authority, the expression "court of law" for the purposes of this section includes such Governor.

(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

(3) Subject to the provisions of this Act any enactment referring to a Vice-Admiralty Court, which is contained in an Act of the Imperial Parliament or in a Colonial Law, shall apply to a Colonial Court of Admiralty, and be read as if the expression "Colonial Court of Admiralty" were therein substituted for "Vice-Admiralty Court" or for other expressions respectively referring to such Vice-Admiralty Courts or the Judge thereof, and the Colonial Court of Admiralty shall have jurisdiction accordingly.

Provided as follows :

(*a*) Any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales.

By the provisions contained in Section 2, Colonial Courts of Admiralty (India) Act, 1891, the High Courts at Calcutta, Bombay and Madras and the then District Court of Karachi were expressly declared to be Colonial Courts of Admiralty.

Since 1861 important changes in the extent of the jurisdiction of the Admiralty Court in England have been effected by the enactment of divers statutes, but none of them has any application to India.

It should be noted that by Section 18(2) of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), the words "British possession" in proviso (*a*) to Section 2 of the Colonial Courts of Admiralty Act, 1890, mean "any part of Her Majesty's Dominions exclusive of the United Kingdom, and where parts of such Dominions are under both a Central and a Local Legislature, all parts under the Central Legislature shall, for the purposes of this definition, be deemd to be one "British possession".

Coming back to the judgment of P. B. Mukharji J. (2), we may note the following observations of his Lordship :

"As the previous Government of India Acts continuing the Admiralty Jurisdiction conferred on this Court by the Charter of 1774, were Acts of the Imperial Parliament, the problem of construction here presented in this suit is that by reason of proviso (*a*) to section 2 of the Colonial Courts of Admiralty Act, 1890, the words 'domiciled in England or Wales' in section 5 of the Admiralty Court Act, 1861, have to be read

as 'domiciled in the Union of India' now under the Constitution of India. That is the obvious and prima facie import of the words 'all parts under the Central Legislature shall for the purposes of this definition be deemed to be one possession'. That meaning can only be replaced if there is anything repugnant to the context showing 'a contrary intention', an expression used in the opening words of S. 18 of the Interpretation Act of 1889.

"In the case of—'*Madras Steam Navigation Company, Ltd.* v. *Shalimar Works, Ltd.*', A.I.R. 1915 Cal. 681, Chief Justice Jenkins deciding an appeal from a suit on the Original Side and dealing with a cognate subject observed in the year 1914 at page 684 of the Report :

'British India and Burma thus take the place of England and Wales for the purposes of this case'.

"In the present context under the Constitution of India on a parity of reasoning followed by Chief Justice Jenkins the Union of India takes the place of England and Wales for the purpose of the suit now before me(2)."

In the case before his Lordship(2) there was a claim for necessaries supplied in the port of Calcutta to a ship registered in the port of Madras and the owner of it was domiciled in the Indian Union. The learned Judge held that as the supplier could seek his remedy by the ordinary processes of law in the ordinary civil courts of the land, the Calcutta High Court could not exercise its Admiralty jurisdiction to entertain such claim.

In two more recent decisions(4) Shah J. of the Bombay High Court discussed at length the scope and nature of the Admiralty Jurisdiction of that Court with particular reference to torts committed on the high seas. Both the suits had been instituted in the City Civil Court at Bombay—the first one being for damages alleged to have been suffered by the plaintiff on account of a collision at a distance of about ten miles from Worli Sea Shore between the defendant company's cargo boat "JALAMANJARI" and the plaintiff's country craft "PANDAVI", resulting in the breaking and sinking of the said country craft, and the other being for damages alleged to have been suffered by the widow and heirs of a fisherman who had died as the result of that collision. The learned Judge dismissed both the appeals and held that such suits fell exclusively within the Admiralty Jurisdiction of the High Court.

Each chartered High Court in India has prescribed a set of Admiralty rules applicable for regulating the procedure and practice in cases brought before it under the Colonial Courts of Admiralty Act, 1890. In relation to the Calcutta High Court such rules came into operation in June 1912. These rules which had been made by the Honourable Judges of the Calcutta High Court were approved at a meeting of the Privy Council held in December 1911. It may be noted that the

(4) *Kamalakar* v. *S. S. N. Co. Ltd.*, A.I.R. 1961 Bom. 186 ; *Kashibai* v. *S. S. N. Co. Ltd.*, A.I.R. 1961 Bom. 200.

warrant of arrest of a ship or cargo in an action in rem is expressed in a language which is quaint, the process-server is none other than the Marshal of the Court, and service is effected in an extraordinary manner by nailing or affixing the original writ or warrant for a short time on the main mast or on the single mast of the vessel and by taking off the process, leaving a true copy of it nailed or affixed in its place. It is a matter of great interest that when a Judge of the Court is exercising his jurisdiction in Admiralty a silver oar is brought in and placed before him bearing the symbol of anchor and chain—the emblem of the Navy. Since 1957 a new silver oar has been in use in this Court bearing the same symbol as well as the emblem of the Union of India.

Now, the High Court of Justice and the Court of Appeal in London together constitute the Supreme Court of Judicature, and Admiralty practice in the Supreme Court of Judicature is governed principally by:

(*1*) the Supreme Court of Judicature (Consolidation) Act, 1925, and the Administration of Justice Act, 1956;

(*2*) those sections of the Admiralty Court Acts of 1840 and 1861 which were not repealed by the Act of 1925 nor by Rules of the Supreme Court having the repealing effect given by section 99 of the latter Act;

(*3*) the Rules of the Supreme Court, principally Order 75;

(*4*) case law;

(*5*) the Admiralty Short Cause Rules; and

(6) Practice Notes posted in the Admiralty registry.

The Act of 1925 by S. 103 provides in effect that where no other provision is made procedure and practice formerly in force may continue to be used(5).

It will be enough to state here that Section 1 of the Administration of Justice Act, 1956, greatly widened the scope of the jurisdiction of the Admiralty Court of England(5A).

It should be remembered that almost every Admiralty action is an action in rem or an action in personam. In comparatively rare cases, actions may be both in rem and in personam. The former is an action against a res; this is the word used in Admiralty for a limited number of things such as ships and their cargoes and freight on which the writ of summons in the action may be validly served and which may be arrested and sold by the court to meet the plaintiff's claim or the claims of a number of plaintiffs, provided that the claim or claims are proved to the satisfaction of the court. This is the essence of the procedure in rem. The fact that bail or, by agreement of parties, other security may be given to prevent or to secure release from arrest, and that the plaintiff's claim may be satisfied by the owner of the res or his insurers or third parties without its being necessary to call on the sureties to the bail

(5) *British Shipping Laws*, Vol. I, Ch. 1. See also Halsbury's *Laws of England*, Simonds ed., Section 2, p. 48.

(5A) *The Queen of the South*, (1968) 2 W.L.R. 973, 977-9 (per Brandon J.).

bond or other security or to sell the res, are no more than developments of the process(5).

Unless a defendant or, by leave of the court, an intervener, appears in the action and by providing security or otherwise prevents arrest, the process of arrest of the res at the commencement of the action, its condemnation by decree of the Admiralty Court in proceedings in rem after judgment in default, and its sale by the marshal free from all incumbrances, will always follow; this is provided, of course, that the plaintiff, or usually his solicitors, since the litigant in person is a great rarity in Admiralty, takes all the necessary procedural steps and establishes his claim(5).

It is to be noted that the successful plaintiff may not always be able to obtain payment out of the proceeds of sale of the res; this may depend partly upon the amount in court and, if there are other plaintiffs, partly or wholly upon priorities(5).

It is also to be noted that when a res has been sold, and the proceeds of sale have been paid into court by the marshal, the proceeds of sale represent the res and any subsequent proceedings may be commenced against those proceeds as if they were the property in question, although no arrest is necessary or permitted. In such cases the writ is served upon the Admiralty registrar or a district registrar. Subject to the operation of the doctrine of priorities, a plaintiff whose action is against the proceeds of sale may be paid out of the fund in court(5).

In *"The Tolten"*, (1946) P. 135, an action in rem was brought by the United Africa Co. Ltd., who claimed to be the owners and occupiers of the Bulk Oil Wharf at Lagos, against the owners of the British motor vessel *Tolten* for damage done to their wharf when the *Tolten* came into collision with it on October 13, 1944, while proceeding to sea. The plaintiffs alleged that the vessel was negligently navigated by the defendants or their servants on board the *Tolten*. The defendants, who by their pleadings specifically denied (inter alia) that the plaintiffs were the owners and occupiers of the wharf in question, objected, on a preliminary point of law, that the court had no jurisdiction to adjudicate in an action in rem for damage done by a vessel to property attached to foreign soil.

Bucknill J. in a reserved judgment on December 3, 1945, decided in favour of the plaintiffs, and held that the Admiralty Court Act, 1861, stated simply that the High Court of Admiralty shall have jurisdiction over "any claim for damage done by any ship", and did not limit the locality in any way; that that Act had been held to apply to damage done by a ship to a pier in British waters, and to damage by collision between ships in foreign waters. His Lordship saw no reason why a case of the kind in question should not be included within the plain words of the statute, and over-ruled the objection.

The defendants appealed, but their appeal was dismissed by the Court of Appeal consisting of Scott, Somervell and Cohen L. JJ., who held that the High Court in England, in the exercise of its Admiralty jurisdiction,

by the general law of the sea and under section 7 of the Admiralty Court Act, 1861, has jurisdiction to adjudicate in an action in rem where the claim is against the owners of a ship which has done damage to a wharf or to any structure attached to and forming part of the soil of foreign territory. The Supreme Court of Judicature (Consolidation) Act, 1925, Section 22, sub-section I(a)(iv) did not create or extend the jurisdiction.

Scott L.J. explored the maritime field fully in delivering his judgment and at p. 142 observed :

> "Proceedings in admiralty against the owners of a delinquent ship may, at the choice of the plaintiffs, be either in personam or in rem. In the former procedure the defendants are named as in a King's Bench writ ; in the latter, the writ is addressed to 'the owners of the . . . ship' as defendants ; the proceeding is against the ship, and no personal service is required."

In other words, the proceeding of either nature would be exclusively in the Admiralty and would not lie in any other Court. This, therefore, was the extent and scope of the jurisdiction of the High Court of Admiralty in 1861 and for all practical purposes that is the jurisdiction which is now being exercised by the High Court of Justice in England in its Admiralty Division.

Scott L. J. observed further :

> "The limiting rules of the common law about venue were unknown in the Court of Admiralty ; and the universality of the world area, over which it administered justice, both civil and criminal, affords a striking contrast to the locally restrictive rules of common law jurisdiction. And here again I lay special emphasis on the degree to which, and the frequency with which in admiralty judgments, both original and appellate, considerations of policy such as the interest of maritime commerce, and the world's need of uniformity in maritime law, have played a conscious part in the judicial development of British admiralty law.

Scott L. J. discussed in his judgment the meaning of the widely used expression "the high seas" in admiralty matters, and referring to *"The Mecca"*, (1895) P. 95 (where the Court of Appeal consisting of Lord Halsbury, Lindley and A. L. Smith L.JJ. as a matter of course had treated Alexandria and Algiers as being quite obviously both included in that expression) said :

> "The importance of the decision of this court in the *Mecca* is the unequivocal ruling that *wherever the tide does ebb and flow, i.e.*, wherever ships go, is included within the jurisdiction of our admiralty court. The place where the plaintiffs allege that the *Tolten* was guilty of negligent navigation was in tidal waters, as she was proceeding out to sea. It is therefore clear that so far as locality is concerned our admiralty court had jurisdiction."

Res against which an action in rem may be brought include :

(*a*) In all cases : a ship, that is to say, any description of vessel

used in navigation, and all her equipment and wreck of the ship or equipment, including flotsam, jetsam, lagan and derelict(6);

(*b*) In salvage, in claims by shipowners for unpaid freight, in bottomry, in forfeiture and in condemnation: the cargo in a ship, or cargo landed from a ship and still identifiable as cargo and not delivered to consignees;

(*c*) In salvages, collisions, and bottomry: freight at risk, *viz.*, the money payable, and not yet paid, for carrying cargo in a ship and also, in salvage alone passenger fares at risk;

(*d*) In salvage, towage and pilotage and quaere, damage received by a ship from an aircraft: aircraft and their cargo and equipment (apparel) and wreck;

(*e*) In all cases: the proceeds of sale by the court of any of the foregoing property except freight and passage money.

An action in personam is an action against a person as opposed to a thing.

In a very recent case(7), Brandon J. traced the historical background of statutory rights of action in rem. According to the learned Judge, statutory rights of action in rem were first created by the Admiralty Court Act, 1840. Such rights were given by section 6 in respect, first, of claims for towage, and, secondly, of claims for necessaries supplied to foreign ships, whether within the body of a county or on the high seas. Further rights of the same kind were created by the Admiralty Court Act, 1861. Such rights were given by Section 4 in respect of claims for building, equipping or repairing a ship, if at the date of institution of the cause the ship or its proceeds were under arrest of the court; by section 5 in respect of claims for necessaries supplied to any ship elsewhere than in the port to which she belonged, unless at the time of institution of the cause any owner or part-owner was domiciled in England or Wales; by section 6 in respect of claims by holders of bills of lading of any goods carried into any port in England or Wales for damage to such goods, subject to the same proviso as to domicile of any owner or part-owner; and by section 10 in respect of masters' claims for disbursements. Section 33 further provided that the jurisdiction of the Admiralty Court could be exercised either in rem or in personam.

The procedure of the High Court of Admiralty from 1859 until 1874 was governed by the Rules, Orders and Regulations of the High Court of Admiralty, 1859.

As a result of the Supreme Court of Judicature Acts, 1873 and 1875, the jurisdiction of the High Court of Admiralty was transferred to the Probate, Divorce and Admiralty Division of the High Court. The procedure in Admiralty causes was further modified by rules scheduled to the 1873 and 1875 Acts. These rules made important changes in procedure, providing in particular that all actions (formerly causes) should

(6) For the meanings of these terms, see Kennedy's *"Law of Civil Salvage,"* 4th ed., 1958, pp. 386-7.

(7) *The Monica S.*, (1968) P. 741.

be begun by writ. But they did not cover the whole field, and the old Admiralty rules remained in force except where expressly varied.

This state of affairs continued until October, 1883, when the Rules of the Supreme Court, 1883, came into force, repealing all the old rules of the High Court of Admiralty.

The Admiralty Jurisdiction of the High Court was re-defined with extensions by the Supreme Court of Judicature (Consolidation) Act, 1925.

The provisions of the Act of 1925 remained in force until their supersession by those of the Act of 1956. The 1883 rules continued to apply to Admiralty actions in rem until 1964, when revised rules came into force.

Brandon J. then examined cases on statutory rights of action in rem. Some of these cases are mentioned below.

In *The Pacific*(8) Dr. Lushington held that a necessaries man, claiming under section 5 of the Admiralty Court Act, 1861, did not have a maritime lien.

In *The Princess Charlotte*(9) Dr. Lushington decided that the court had jurisdiction in a cause for necessaries brought under section 6 of the Admiralty Court Act, 1840, despite a sale to a new owner. The sale took place there the day after the institution of the cause and on the same day as the arrest.

In *The Two Ellens*(10) the Privy Council approved the decision in *The Pacific* that section 5 of the Admiralty Court Act, 1861, did not give a necessaries man a maritime lien.

In *The Pieve Superiore*(11) the Privy Council decided two matters in relation to a claim by a bill of lading holder for damage to cargo under section 6 of the Admiralty Court Act, 1861. The first matter was whether, on the facts, the claim came within the section, and it was held it did. The second matter was whether the section gave a maritime lien and it was held that it did not.

In *The Heinrich Bjorn*(12) the Court of Appeal held, contrary to what had previously been thought to be the law on the matter, that section 6 of the Admiralty Court Act, 1840, did not, any more than section 5 of the Admiralty Court Act, 1861, confer a maritime lien in respect of a claim for necessaries; and that, accordingly, a transfer of ownership of a ship before action brought prevented a necessaries claimant from succeeding in an action in rem against the ship under that section. This decision was affirmed by the House of Lords.

In another recent case(13) S. K. Mukherjea J. of the Calcutta High

(8) (1864) Br. & Lush. 243.
(9) (1864) 33 L.J. Adm. 188.
(10) (1872) L.R. 4 P.C. 161.
(11) (1874) L.R. 5 P.C. 482.
(12) (1885) 10 P.D. 44; (1886) 11 App. Cas. 270.
(13) *National Co. Ltd.* v. *Owners & Parties interested in M.S. "Asia Mariner"*, (1967) 72 C.W.N. 635.

Court delivered a very well-considered judgment, tracing the origin and extent of the Admiralty jurisdiction of that Court and dealing at length with the scope and application of Section 6 of the Admiralty Court Act, 1861. In that case a bill of lading was issued in Bangkok before actual shipment of goods and was alleged to be false and antedated, and a question arose whether a claim for issuing such a bill of lading was within the scope of that section.

His Lordship observed :

"The High Court at Calcutta as a Court of Admiralty is, therefore, a Court of prescribed jurisdiction. Its jurisdiction is prescribed by clause 26 of the Charter of 1774 and by section 2(2) of the Colonial Courts of Admiralty Act, 1890. The jurisdiction has not been extended or modified by any statute. None of the subsequent British statutes by which the Admiralty Jurisdiction of the High Court in England has been extended or affected have been made applicable to India."

His Lordship then traced the early history of the Admiralty Court in England, and, after referring to the Admiralty Court Acts of 1840 and 1861, said :

"In England the jurisdiction of Courts of Admiralty in rem in matters arising out of contracts for the carriage of goods and cargo claims is founded on statutes. Jurisdiction in relation to the carriage of goods was first acquired by the Admiralty Court Act, 1861. . . .

"There was no further extension of Admiralty jurisdiction of the High Court in England by statute or otherwise over cargo claims or over contracts of carriage of goods till 1920, so that at the time when the Colonial Courts of Admiralty Act, 1890, was enacted, the High Court in England in its Admiralty jurisdiction could exercise jurisdiction in those matters only under the Admiralty Court Act, 1861. Therefore, it transpires, that this Court can have jurisdiction to entertain the present action, if at all, only under the Admiralty Court Act, 1861, and under no other statute or principle."

His Lordship discussed a number of English decisions relating to the application of Section 6 of the Act 1861 and said :

"In my opinion, in applying section 6 of the Act of 1861 it is not permissible to go behind the bill of lading as it stands, for the whole object of the Act is to provide the owner or the consignee or the assignee of the bill of lading with a remedy for acts of omission and commission on the part of the owner, master or crew of the ship in the matter of carriage and delivery of the goods shipped in accordance with the tenor of the bills of lading. . . . .

"The section has been liberally construed in *The St. Cloud*(14), *The Norway*(15) and by the Privy Council in *The Pieve Superiore*(11). In *The Pieve Superiore* the Privy Council said : 'The statute being

(14) 167 E.R. 269.
(15) 167 E.R. 347.

remedial of a grievance, by amplifying the jurisdiction of the Court of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally so as to afford the utmost relief which the fair meaning of its language will allow.' It is on this principle that the expression 'damage done to the goods' in the section was given a wider meaning in some cases. The section, however, cannot be stretched to serve purposes which it was not intended to serve and which the fair meaning of the section does not permit. The object of the statute, as Dr. Lushington said in *The St. Cloud*(14), was to provide a remedy for non-delivery, short delivery or damage to goods before an English tribunal. The object was not to provide a remedy for misstatements made in the bills of lading or for anything done which is not connected with carriage or delivery of goods. As will be seen, remedy for causes, other than non-delivery, short delivery or damage to goods, arising out of a contract of carriage, was provided by subsequent enactments in England. No corresponding statutes have been passed by the Indian Legislature."

After referring to the case of *The St. Elefterio*(16), his Lordship added :

"By section 21 of the Administration of Justice Act, 1920 (10 & 11 Geo. 5 Ch. 81), section 6 of the Admiralty Court Act, 1861, was repealed in relation to England and Wales and was substituted by section 5 (of the Act of 1920). . . . .

"By Section 226 of the Supreme Court of Judicature (Consolidation) Act, 1925, (15 & 16, Geo. 5 Ch. 49), Section 5 of the Admiralty Jurisdiction Act, 1920 was repealed, but was re-enacted substantially in the same language by section 22(1)(a)(xii). The extension of the jurisdiction of the Court by the Act of 1920 in respect of cargo claims is recognised in the Preface to the fifth edition of Roscoe's Admiralty Jurisdiction and Practice (1931). The learned editor says:— 'By the Administration of Justice Act, 1920 (now consolidated in section 22 of the Judicature (Consolidation) Act, 1925) the jurisdiction of the Court in relation to cargo claims has been extended in certain directions. Whereas the admiralty jurisdiction in such cases was formerly 'restricted to claim for damage to cargo by the owners, consignee or assignee of the bills of lading, the jurisdiction now extends to claims either in contract or in tort in respect of cargo carried in any ship.'

"Thereafter by Section 49 of the Administration of Justice Act, 1956 (4 and 5 Eliz. II, Ch. 46), section 22 of the Supreme Court of Judicature (Consolidation) Act, 1925 was repealed and was substituted by section 1(i)(h). The material part of the section provides as follows:— The Admiralty Jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims :

(16) 1957 P. 179.

(*h*) any claim arising out of any agreement relating to the carriage of goods in a ship.

"By section 1(i)(h) a jurisdiction wider than the jurisdiction conferred by section 5(1) of the Act of 1920 or section 22(1)(a)(xii) of the Act of 1925 was vested in the Court. It is no longer necessary that the claim should relate to the carriage of goods or should be in respect of goods carried in any ship. All that it required is that the claim must arise out of an agreement for carriage of goods.....

"The Act of 1956 provides that the High Court in its Admiralty Jurisdiction shall have jurisdiction to hear and determine any claim arising out of any bill of lading. A claim for issuing an antedated bill of lading or a false bill of lading or a bill of lading in contravention of the Hague Rules will certaintly be a claim arising out of a bill of lading and such a claim will be well within the scope of section 1(i)(h) of the Act of 1956 but not within the scope of section 6 of the Act 1861. Such a claim will not come within the scope of section 6 of the Act of 1861 because the claim, though arising out of a bill of lading, is not, without anything more, in respect of damage done to the goods nor does it relate to goods carried by the vessel."

And towards the end of his judgment his Lordship made some pertinent observations :

"The Admiralty Court Act, 1861, although repealed in part in relation to England and Wales, remains in force in India. None of the subsequent English statutes relating to Admiralty jurisdiction over cargo claims or contract of carriage have been made applicable to the High Courts in India exercising jurisdiction in Admiralty.

"In the view I have taken, I have to pronounce as I must, against the jurisdiction of this Court to try this action in its Admiralty Jurisdiction. It seems to me that Indian merchants have no right before an Indian tribunal exercising jurisdiction in Admiralty, to prosecute a claim arising out of an antedated or false bill of lading against a foreign shipowner and proceed against a foreign ship. They can have no relief unless the cause of action relates to and damage is done to the goods. In England, the remedy has been provided by Parliament by appropriate legislation. It is time the Indian legislature did the same.

"However, it is not for the Courts of law, to provide relief, where relief should be provided by the legislature, by straining the construction, against principles and precedents, of a provision of a century old statute, repealed in the country of its origin, and assume powers which more properly belong to the legislature."

Before I conclude this lecture I respectfully endorse the above observations of the learned Judge, and I say that our Law Commission ought to consider seriously and early how best it can make our antiquated Admiralty law upto date in order, inter alia, to ameliorate the plight of Indian merchants and to provide suitable relief for them in Indian Admiralty Courts with reference to matters specifically mentioned

in his Lordship's observations or analogous thereto. Indeed, this is one of those matters which deserve top priority in the disposal of Parliamentary business, just like the amendment of the Indian Marine Insurance Act II of 1963 which is badly needed in order to plug the unfortunate omission in that Act of provisions for confining re-insurance to Indian insurance companies only with a view to prevent the annual loss to India of a substantial amount of foreign exchange in these hard times.

LECTURE XIV

CHARTERPARTIES & BILLS OF LADING COMMONLY USED IN EASTERN WATERS

It will be convenient now to refer to certain clauses included in some forms of charterparties and bills of lading which are commonly used in the international trade of India, viz. forms of the Baltic and International Maritime Conference.

The Baltic and International Maritime Conference of Copenhagen founded in 1905 has members throughout the world of the following three classes :

(*a*) Owner Members, *i.e.*, Members owning or managing ships ;

(*b*) Broker Members, *i.e.*, Members who are Shipbrokers or Chartering Agents ; and

(*c*) Club Members, *i.e.*, Protection and Indemnity Associations ; Freight, Demurrage and Defence Associations ; Shipping Federations ; and other combinations of Shipowners.

The Indian members of the Conference include the Shipping Corporation of India Ltd., F. W. Heilgers & Co. Ltd. and Shaw Wallace & Co. Ltd. As at May 1969 the membership of the Conference consisted of 739 owner members, 1098 broker members and 42 club members.

One of the objects of the Conference is "to prepare and improve charterparties and other shipping documents and to do so wherever possible by means of friendly conference and arrangement with Charterers, Shippers, Merchants, Receivers, Shipowners, and others connected with the industry, or with organisations representing any such persons, and to exhaust every reasonable means of settlement before issuing any forms for use by Shipowners"(1).

One of the most widely used forms of voyage charterparties of the Conference known under the code name "GENCON" is meant to be used in trades for which no other charterparties have been issued by Shipowners' Associations. It may be employed for grain, fertilizers, phosphates, ore, potash, salt, scrap-iron, stones, logs, prefabricated houses, bricks, cattle relief cargoes, etc.

It appears that the first suggestion as to the drafting of a general form of charter was made at a meeting of the Documentary Council of the Conference held in Paris in April 1913. The drafting was delayed due to the outbreak of World War I in 1914, but the first edition was issued in December 1915 as a "recommended document", and on September 1, 1922, the "Gencon" Charter, as Revised, came out, and the charter has not been revised since.

(1) See the *"Annual Report"* of the Conference for 1968-69.

However, in 1946 the Documentary Council considered whether it would not be advisable to issue an addendum with reference to the

"General Paramount Clause,"
"Both-to-Blame Collision Clause," and
"Amended Jason Clause."

Subsequently, the Documentary Council agreed on the wording of the Baltic Conference Addendum 1946 :

Code Name "Genvoy",

popularly known as the "Genvoy" Slip.

Before taking up the "Genvoy" Slip it will be useful to consider the implications of the three clauses mentioned above.

GENERAL PARAMOUNT CLAUSE

Now, a "general paramount clause" is an express statement that the charterparty or the bill of lading, as the case may be, is subject to the Hague Rules or those set out in the Schedule to the Carriage of Goods by Sea Act, which may be applicable. But failure to include such statement in the contract of affreightment does not of itself render the contract illegal (*Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*, 1939 A.C. 277 P.C.).

BOTH TO BLAME COLLISION CLAUSE

A "both to blame" collision clause is very frequently used, except in the Short Sea and Near Continental trades where goods are carried by shipowners who have no vessels which are likely to visit ports in the United States. Contrary to the practice in most European countries, an American shipowner whose ship is involved in a collision can attach in an American port any ship in the same ownership as the one with which he has collided, in spite of the fact that the collision may have occurred in some distant part of the world. The release of the attached ship can be secured only by provision of bail, usually a very large sum(2).

When the bail has been deposited by the owners of the attached ship, the American shipowner proceeds with the collision action in a court in the United States. By the law of that country, where cargo is lost or damaged in a collision for which both ships are to blame, the cargo-owner may recover in full against the non-carrying ship(3). Then the non-carrying ship may claim one-half of this sum from the carrying ship(4). This is an anomalous result because a shipowner is not directly responsible to cargo-owners for damage arising out of negligent navigation, provided that due diligence has been exercised to make the ship seaworthy. Thus, if a shipowner is solely to blame for a collision, he is usually under no liability to cargo-owners. But if he is partly to blame, he will become indirectly liable to them, as explained above.

(2) Payne, 8th ed., pp. 113, 114.
(3) *The Beaconsfield*, (1894) 158 U.S. 303 ; *The Atlas*, (1876) 93 U.S. 302.
(4) *The Chattahoochee*, (1899) 173 U.S. 540.

Not unnaturally, shipowners felt aggrieved at this result, and in an endeavour to overcome the difficulty they adopted the "both-to-blame collision clause"(2).

In 1952 the legality of the clause was tested in the United States in a case where a bill of lading, *not issued under a charterparty*, contained the clause. The Supreme Court decided that the clause was invalid as being a violation of the rule which in general forbids carriers from stipulating against the negligence of themselves or their employees(5). But it may be that the decision would be different in the case of a charterparty with bills of lading thereunder(2), and for this reason the clause is included in the "Genvoy" slip.

AMENDED JASON CLAUSE

The "amended Jason clause" is generally inserted in all bills of lading for voyages to and from the United States. The necessity for it arises because of an important difference between American law and English law. Briefly, the history of the subject in the United States is as follows. The Harter Act, 1893, s. 3, provides that if a shipowner exercises due care to make his vessel seaworthy, neither he, the vessel, her agent, nor her charterer shall be liable for damage or loss arising from (inter alia) faults or errors in navigation, or in the management of the vessel. After this Act was passed, it was assumed that since it exempted a shipowner from liability for losses arising from negligent navigation he was entitled to recover in general average for the ship's sacrifices which had minimised the greater loss for which he was now relieved from liability. Nevertheless, the Supreme Court of the United States held in *The Irrawaddy*(6) that the exemption in the Act did not entitle a shipowner to claim a contribution for a general average loss due to the negligence of his servants. In English law there is not, and never has been, any rule corresponding with that laid down in *The Irrawaddy*(6). To overcome the difficulty, it became usual to insert a clause in bills of lading for vessels trading to and from the United States, expressly declaring that the shipowner could recover in general average in the event of negligence, provided that due diligence had been exercised to make the ship in all respects seaworthy. The legality of the clause was questioned, and it was eventually decided by the Supreme Court of the United States in *The Jason*(7) that the clause was valid. Thereafter it became known as the "Jason clause". Subsequent decisions necessitated certain changes in the drafting of the clause. The one now in use is generally called the "amended Jason clause"(8), which is included in the "Genvoy" Slip.

(5) *United States of America* v. *Atlantic Mutual Insurance Co.*, (1952) 1 T.L.R 1237.
(6) (1897) 171 U.S. 187.
(7) (1912) 225 U.S. 32.
(8) Payne, 8th ed., pp. 143-144.

"GENVOY" SLIP

The "Genvoy" Slip runs as follows :

Baltic Conference Addendum 1946. Code Name : "Genvoy".

All Bills of Lading under this Charter shall contain the following clauses :

General Paramount Clause.—"This Bill of Lading shall have effect subject to the provisions of any legislation relating to the carriage of goods by sea which incorporates the rules relating to Bills of Lading contained in the international Convention, dated Brussels 25th August 1924 and which is compulsorily applicable to the contract of carriage herein contained. Such legislation shall be deemed to be incorporated herein, but nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities thereunder. If any term of this Bill of Lading be repugnant to any extent to any legislation by this clause incorporated, such term shall be void to that extent but no further. Nothing in this Bill of Lading shall operate to limit or deprive the Carrier of any statutory protection or exemption from, or limitation of, liability."

. . . . . .

Both-to-Blame Collision Clause.—"If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, Mariner, Pilot or the servants of the Carrier in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying ship or her owners to the owners of said cargo and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying Vessel or Carrier. The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contract."

Amended Jason Clause.—"In the event of accident, danger, damage, or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Carrier is not responsible by statute, contract, or otherwise, the cargo, shippers, consignees, or owners of the cargo shall contribute with the Carrier in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo. If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully as if the salving ship or ships belong to strangers."

A few points about the "Gencon" charter deserve notice.

Now, the "Gencon" Charter stipulates :

"Time lost in waiting for berth to count as loading (discharging) time."

The implication of this stipulation was considered by British Courts(9). It implies that the time lost in waiting for berth is counted separately and independently of the laytime proper.

A Gencon (amended) charter provided that time lost in waiting for a berth was to count as discharging time, and that time was not to count between noon on Saturday at unloading ports and 8 a.m. on Monday morning. The vessel, *"The Vastric"*, which was carrying scrap metal from U.K. to Italy, anchored in Roads outside the commercial area of Genoa at 1.20 p.m. on Saturday, no berth being available, and berthed on the following Tuesday morning. On a special case as to whether time ran from arrival on Saturday or from the earliest time discharging time would have commenced if a berth had been available (1 p.m. on Monday), it was heid that time lost must be calculated from the time of anchoring until the vessel shifted from anchorage to berth, and demurrage was to be calculated accordingly.*

The waiting time is counted continuously in running days of 24 hours without any exceptions, such as Sundays, holidays, rainy days, etc., which might be exempted from the laytime.

When the vessel has ceased losing any time in waiting for berth and is proceeding to the berth the vessel must tender notice according to the charterparty, and the laytime proper is counted as per the charterparty.

After completion of the cargo operations the waiting time is added at the end of the loading (discharging) time, to ascertain the position in respect of demurrage(1).

The following illustration will clarify the principle which is to be employed. Suppose the laytime for the discharging of a particular cargo at a particular port is agreed at 5 days of 24 consecutive hours ; suppose Sundays and holidays are exempted from the laytime ; suppose the discharging port is congested so that the vessel has to wait outside the port after her arrival on, say, Friday, May 12th, at 04.00 hours ; suppose Monday, May 15th, is a holiday at the port ; suppose the berth becomes available at 07.00 hours on Wednesday, May 17th, enabling the vessel to enter the port at 08.30 hours on that day ; suppose the discharging is not completed until 12.00 hours on Wednesday, May 24th.

The calculation will be like this(1) :

(9) See *North River Freighters* v. *President of India*, (1956) 1 Q.B. 333 ; *Government of Ceylon* v. *Societe Franco-Tunisienne d'Armement-Tunis*, (1962) 2 Q.B. 416, and *The Vastric Case*, (1966) 2 Lloyd's Rep. 219.

**Melals & Ropes Co.* v. *Filia Compania*, (1966) 2 Lloyd's Rep. 219.

Time lost in waiting for berth :
Friday, 12/5 04.00—
Wednesday, 17/5 07.00 5 days 3 hours 0 minutes

Laytime counts :

Wednesday,	17/5	13.00-24.00	=	0	days	11	hours	0 minutes
Thursday,	18/5	00.00-24.00	=	1	—	0	—	0 —
Friday,	19/5	00.00 24.00	=	1	—	0	—	0 —
Saturday,	20/5	00.00-24.00	=	1	—	0	—	0 —
Sunday,	21/5	—	=	—		—		—
Monday,	22/5	00.00-24.00	=	1	—	0	—	0 —
Tuesday,	23/5	00.00-13.00	=	0	—	13	—	0 —
				5	days	0	hours	0 minutes

Time on Demurrage :

Tuesday,	23/5	13.00-24.00	=	0	days	11	hours	0 minutes
Wednesday,	24/5	00.00-12.00	=	0	—	12	—	0 —
				0	days	23	hours	0 minutes

Plus time lost in waiting for berth.....				5	—	3	—	0 —
				6	days	2	hours	0 minutes

In determining what actually constitutes *"time lost in waiting for berth"*, it will be reasonable to assume that this is the time occupied in waiting at a place where the laytime proper may not start to count. It should be taken into account that according to British law, for the purpose of making the laytime run, a vessel must be an *"arrived ship"* and must thus have arrived within the commercial area of the port, or at the berth in the event of a "berth" charter. If the vessel waits outside the port in the first instance, or outside the berth in the second instance, according to British law, the vessel will not be able to tender a valid notice of readiness for the purpose of making the laytime commence. Consequently, the time is "lost" until the berth becomes available, enabling the vessel to leave her waiting place(1).

It goes without saying that the principles established in the judgments should be applied with common sense and only in cases where it may, in fact, be claimed that time was "lost" in waiting for berth. For instance, if a vessel arrives in the roads, say, on a Saturday afternoon and for lack of berth is kept outside the port until Monday morning, it would hardly be reasonable in such case to count the time from Saturday afternoon until Monday morning as *"time lost in waiting for* berth", because the laytime is counted from Monday, 13.00 hours, exactly as if the vessel had been able to proceed into port on her arrival on Saturday afternoon(1).

Some of the principal clauses usually found in most voyage charters have already been referred to(10). Most of these are present in the "Gencon" charter(11) in some form or other, and additional clauses, including the following, find place in it :—

(*1*) Deviation clause, authorising the vessel to deviate for the purpose of saving life and/or property ;

(*2*) Lien clause in favour of the owners of the vessel on the cargo for freight, dead freight, demurrage and damages for detention ;

(*3*) Bills of Lading clause, permitting the captain to sign Bills of Lading at such rate of freight as presented without prejudice to the charterparty ;

(*4*) General Average clause, providing for the same to be settled according to York-Antwerp Rules, 1950 ; and

(*5*) Indemnity clause.

As no special bill of lading existed to be used with the "Gencon" charter, the Documentary Council of the Baltic & International Maritime Conference decided in 1946 to use such a special bill of lading, known as "Uniform Bill of Lading 1946" (to be used with charterparties), the code name being "CONGENBILL"(11).

The "General Ore Charterparty 1962"(11) (Code name : "GENORECON") of the Baltic & International Maritime Conference is drafted on rather modern principles with fair loading and discharging conditions and without any stipulation for despatch money. This form of charter is used for iron ore shipments all over the world. It is said that it is used annually for shipment of about 25 million tons of Swedish iron ore under a special code name, and for shipment of about 8 million tons of iron ore from Liberia every year under another special code name. It has not yet become popular in India. But it is much more comprehensive than the "Gencon" charter ; for, while the "Gencon" charter has fifteen clauses only, the "Genorecon" charter runs into no less than thirtyeight clauses.

The United Kingdom Chamber of Shipping Fertilisers Charter, 1942 (Code name : "FERTICON")(11A), has been adopted by the Baltic & International Maritime Conference and is extensively used in India for fertiliser cargoes. It is substantially the same as the "Gencon" charter, but has some additional clauses.

The Australian Grain Charter, 1956 (Code name : "AUSTWHEAT") (11A), is widely used in India for wheat cargoes. It follows the pattern of the "Gencon" charter to some extent, but is much more comprehensive and consists of thirtyfive clauses.

Coming now to time-charters, it may be pointed out that the form of

(10) Lecture II.

(11) Specimens have been reproduced in the Appendix by the courtesy of Mr. H. Steuch, General Manager of the Baltic & International Maritime Conference.

(11A) Specimens have been reproduced in the Appendix by the courtesy of the Chamber of Shipping, United Kingdom.

time-charter most commonly used in India is the Uniform Time Charter of the Baltic & International Maritime Conference (Code name : "BALTIME 1939"). The "Baltime" charter(11) was issued for the first time in 1909 and revised in 1911, 1912, 1920, 1939 and 1950. The "Baltime 1939", which has twentyfive clauses in all, is considered to be a fair and reasonable document which is worded in a clear manner setting out definitely the rights and obligations of owners and time charterers, thus minimizing the risk of disputes. Besides containing in some form or other the usual clauses to be found in most time-charters, it consists of additional clauses relating, inter alia, to excluded perils, loss of vessel, salvage and lien. The "Baltime 1939" is a form which is used all over the world, and on this form thousands of fixtures are concluded every year.

It is not necessary to deal with the clauses to be found in the "CONGENBILL"(11) or the "CONLINEBILL"(11) or the CONLINETHRUBILL", but it may be pointed out that although the "Conlinebill and the "Conlinethrubill", which are almost identical, contain standard liner terms approved by the Baltic & International Maritime Conference, the terms are not compulsory, and special conditions prevailing in special trades and ports may necessitate the addition of special clauses in these two types of bills of lading. The clauses of bills of lading approved by this Conference may be usefully compared with the clauses of bills of lading of the Scindia Steam Navigation Company Limited or the Great Eastern Shipping Company Limited(12), both of which conduct extensive shipping business in India.

On account of stoppage of all traffic through the Suez Canal as the result of warlike operations between Egypt and Israel shipowners were compelled to proceed via the Cape of Good Hope. The Documentary Council of the Baltic & International Maritime Conference issued a "Suezstop" clause to be embodied in charterparties and/or bills of lading to save shipowners from big losses due to such diversion of traffic. Likewise it issued a "Panstop" clause to cover interruptions to navigation through the Panama Canal.

The Pound Sterling was devalued in Great Britain in November 1967, and a number of other countries followed suit. To avoid loss as a consequence of the devaluation a number of liner conferences increased their basic rates or introduced surcharges. The Documentary Council of the Baltic & International Maritime Conference advised the adoption of its "Currency Clause" which it had recommended earlier. This clause is primarily intended for time charter business, but, suitably adapted, it may also be used in voyage chartering.

It will be found that although the actual terms of bills of lading may vary from company to company, provisions are made in them for the following :

(12) A specimen has been reproduced in the Appendix by the courtesy of the Great Eastern Shipping Company Limited.

(*a*) a general paramount clause;
(*b*) the apparent condition, and leading marks, of the goods;
(*c*) a clause about the mode of delivery;
(*d*) the amount of freight to be paid;
(*e*) a clause about the shipowner's lien over the goods carried;
(*f*) a deviation clause;
(*g*) a list of excepted perils;
(*h*) a "both-to-blame" collision clause;
(*i*) a clause incorporating the York-Antwerp Rules, 1950; and
(*j*) a clause about the law which will govern the contract.

Coming now to the end of this lecture, attention should perhaps be drawn to the dismal picture of the progress which India has made in the ship-building industry as well as in international trade since obtaining Independence. The potentialities are still there, and all that is required is a strong patriotic sense and firm determination to work hard and selflessly to hold up the image of India as "the Queen of the eastern waters", as she was actually in ages long gone by. Now about a quarter of a century has passed since the termination of the Second World War which crushed West Germany and humbled Japan. And yet Japan is now foremost in the ship-building industry, and West Germany has made such recovery that it is in a position to offer huge loans to under-developed and developing countries like India and other oriental countries and to monopolise a substantial part of world trade. As already mentioned in the opening lecture, Indians of old did their utmost to make the best use of the opportunities presented by nature for the development of Indian maritime activity, viz. the fine geographical position of this vast sub-continent in the heart of the Orient, the extensive seaboard exceeding four thousand miles and the wonderful net-work of rivers opening into the interior. Indeed, these are but a few of the specific geographical conditions the conjunction or assemblage whereof is to be found in India and on which depends greatly the commercial and maritime development of a country. But Indians of the present day must wake up and be prepared to face stern facts.

Now, it appears from official records available that the total tonnage of ships built in the different shipyards of the world has been steadily on the increase, and data for 1968 seem to indicate that in that year a total of 16.8 million tons was reached. But the shipbuilding industry in India, in its modern sense, is still "in an embryonic stage", and the contribution of India to world shipbuilding is *less than one-eight of one per cent.* This represents roughly 0.18 per cent of the total of industrial activities in India. Furthermore, India is not able to carry in her own ships more than 15% of the total cargo imported into India and exported from India, and the tonnage under the Indian flag is below 2 million tons, while the tonnage is required to reach at least 6 million tons if a sizeable proportion of India's cargo is to be carried in Indian ships. In order to attain this a *fourteen-fold increase* from the present level of shipbuilding activity of 20,000 tons per year is neces-

sary. The Government of India should be persuaded to shed some of its preoccupations with improving only the shipping industry and should be coaxed to devote attention to the shipbuilding industry too. It is essential that a scheme should be evolved of rationalisation of production in the three existing major shipbuilding units in India in the public sector and also in the fourth unit planned for Cochin under Government ownership, and realistic shipbuilding programmes should be drawn up and speedily approved, entailing, inter alia, the supply of the requisite quality and quantity of steel and the availability of foreign exchange for the import of machinery which cannot be had in India. If rationalised production preferably "under a single management with integrated facilities, combined buying and marketing procedures and common research and development activities" be planned and implemented in modernised shipyards, there is no reason why Indian shipbuilding cannot become competitive in the world markets. But a coherent national policy must be evolved and steadfastly pursued*.

Again, the port of Calcutta plays a very important role in both the foreign trade of India and the coastal shipping of India. On the basis of detailed studies which have been undertaken it is expected that the port of Calcutta (including the port of Haldia which is nearing completion) "will be called upon to handle considerably more traffic during the next 15-20 years, viz. from less than 10 million tonnes in 1966-67 to over 45 million tonnes by 1985-86.....With the provision of modern port facilities at Haldia, including mechanical handling of iron ore, coal, salt, fertilisers and oil, and with the provision of container berths, together with setting up of oil refinery, fertiliser factory and perhaps a complete petro-chemical complex by 1985-86, there is no doubt that the port of Calcutta including Haldia would undergo significant changes and will be called upon to handle significantly more traffic". But the people who toiled against heavy odds to save the port of Calcutta by accelerating the construction of the Farakka Barrage "worked 20 hours a day, 7 days a week, for a long time and at a tempo which is truly impressive"*. Similar has been the tempo of the work of construction under extremely difficult circumstances of the port of Haldia which is expected to be completed by 1971.

Is it too much to expect Indians of the present day to take stock of their unsatisfactory position as a maritime nation or to realise the natural advantages of India, and to remain fully conscious of the same, and for the glory and well-being of their country to work in a tireless and patriotic manner in order to raise substantially the level of their shipbuilding activity, just as the dedicated band of workers abovementioned devoted themselves heart and soul to speed up the completion of the port of Haldia and the barrage at Farakka ?

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*See printed booklet of symposium papers on "Future of the Port of Calcutta" published in May 1969 by the Institute of Port Management, Calcutta.

APPENDIX A

Specimen Uniform General Charter

Code Name : "GENCON"

(Reproduced by the country of Mr. H. Steuch, General Manager, Baltic and International Maritime Conference, Copenhagen.)

SEAL

RECOMMENDED

UNIFORM GENERAL CHARTER

Figures in brackets denote clause numbering in 1922 edition

As revised 1922
Layout 1966

Code Name :
Gencon

PART A

Place and date :

1. (1) IT IS THIS DAY MUTUALLY AGREED between

Owners

Owners of the steamer

Position

or motor-vessel of
tons gross/net Register and
carrying about tons of deadweight cargo, now
and expected ready to load under this Charter about

Charterers

and Messrs.
of as Charterers.

Where to load

That the said vessel shall proceed to
or so near thereto as she may safely get

Cargo

and lie always afloat, and there load a full and complete cargo (if shipment of deck cargo agreed same to be at Charterer' risk) of

(Charterers to provide all mats and/or wood for dunnage and any separations required, the Owners allowing the use of any dunnage wood on board if required) which the Charterers bind themselves to ship, and being so loaded the vessel shall proceed to

Destination

as ordered on signing Bills of Lading or so near thereto as she mays afely get and lie always afloat and there deliver the cargo on being paid freight—on delivered/intaken quantity—as follows :

Rate of Freight

Payment of Freight

2. (4) The freight to be paid in cash without discount on delivery of the cargo at mean rate of exchange ruling on day or days of payment, the receivers of the cargo being bound to pay freight on account during delivery, if required by Captain or Owners.

Cash for vessel's ordinary disbursements at port of loading to be advanced by Charterers if required at highest current rate of exchange subject to two per cent. to cover insurance and other expenses.

Loading

3. (5) Cargo to be brought alongside in such a manner as to enable vessel to take the goods with her own tackle and to load the full cargo in running working days. Charterers to procure and pay the necessary men on shore or on board the lighters to do the work there, vessel only heaving the cargo on board.

If the loading takes place by elevator cargo to be put free in vessel's holds, Owners only paying trimming expenses.

Any pieces and/or packages of cargo over two tons weight, shall be loaded, stowed and discharged by Charterers at their risk and expense.

Time to commence at 1 p.m. if notice of readiness to load is given before noon and at 6 a.m. next working day if notice given during office hours after noon.

The notice to be given to the Shippers, Messrs.

Time lost in waiting for berth to count as loading time.

Discharging

4. (6) Cargo to be received by Merchants at their risk and expense alongside the vessel not beyond the reach of her tackle and to be discharged in running working days. Time to commence at 1 p.m. if notice of readiness to discharge is given before noon, and at 6 a.m. next working day if notice given during office hours after noon.

Time lost in waiting for berth to count as discharging time.

Demurrage

5. (7) Ten running days on demurrage at the rate of per day or pro rata for any part of a day, payable day by day, to be allowed Merchants altogether at ports of loading and discharging.

Cancelling Clause

6. (11) Should the vessel not be ready to load (whether in berth or not) on or before the Charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before vessel's expected arrival at port of loading. Should the vessel be delayed on account of average or otherwise, Charterers to be informed as soon as possible, and if the vessel is delayed for more than 10 days after the day she is stated to be expected ready to load, Charterers have the option of cancelling this contract unless a cancelling date has been agreed upon.

Agency

7. (14) In every case the Owner shall appoint his own Broker or Agent both at the port of loading and the port of discharge.

Brokerage

8. (15) % brokerage on the freight earned is due to

In case of non-execution at least ⅓ of the brokerage on the estimated amount of freight and dead-freight to be paid by the Owners to the Brokers as indemnity for the latter's expenses and work. In case of more voyages the amount of indemnity to be mutually agreed.

9.—15.: as in part B, which constitutes a part of this Charter as though fully set forth herein.

Signatures

PART B

Owners' Responsibility Clause

9. (2) Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods (unless stowage performed by shippers or their stevedores or servants) or by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager.

And the Owners are responsible for no loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the Captain or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this clause, be responsible, or from unseaworthiness of the vessel on loading or commencement of the voyage or at any time whatsoever.

Damage caused by contact with or leakage, smell or evaporation from other goods or by the inflammable or explosive nature or insufficient package of other goods not to be considered as caused by improper or negligent stowage, even if in fact so caused.

Deviation Clause

10. (3) The vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property.

Lien Clause

11. (8) Owners shall have a lien on the cargo for freight, dead-freight, demurrage and damages for detention. Charterers shall remain responsible for dead-freight and demurrage (including damages for detention), incurred at port of loading. Charterers shall also remain responsible for freight and demurrage (including damages for detention) incurred at port of discharge but only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo.

Bills of Lading

12. (9) The Captain to sign Bills of Lading at such rate of freight as presented without prejudice to this Charterparty, but should the freight by Bills of Lading amount to less than the total chartered freight the difference to be paid to the Captain in cash on signing Bills of Lading.

General Average

13. (12) General average to be settled according to York-Antwerp Rules, 1950, Proprietors of cargo to pay the cargo's share in the general expenses even if same have been necessitated through neglect or default of the Owners' servants (see clause 9. [2]).

Indemnity

14. (13) Indemnity for non-performance of this Charterparty, proved damages, not exceeding estimated amount of freight.

Strike-, War- and Ice-Clause

15. (10) **Strike-Clause, War-Clause** and **Ice-Clause as below.**

GENERAL STRIKE CLAUSE

Neither Charterers nor Owners shall be responsible for the consequences of any strikes or lock-outs preventing or delaying the fulfilment of any obligations under this contract.

If there is a strike or lock-out affecting the loading of the cargo, or any part of it, when vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, Captain or Owners may ask Charterers to declare, that they agree to reckon the laydays as if there were no strike or lock-out. Unless Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, Owners shall have the option of cancelling this contract. If part cargo has already been loaded, Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.

If there is a strike or lock-out affecting the discharge of the cargo on or after vessel's arrival at or off port of discharge and same has not been settled within 48 hours, Receivers shall have the option of keeping vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging, or of ordering the vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after Captain or Owners have given notice to Charterers of the strike or lock-out affecting the discharge. On delivery of the cargo at such port, all conditions of this Charterparty and of the Bill of Lading shall apply and vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

GENERAL WAR CLAUSE

If the nation under whose flag the vessel sails should be engaged in war and the safe navigation of the vessel should thereby be endangered either party to have the option of cancelling this contract, and if so cancelled, cargo already shipped shall be discharged either at the port of loading or if the vessel has commenced the voyage, at the nearest safe place at the risk and expense of the Charterers or Cargo-Owners.

If owing to outbreak of hostilities the goods loaded or to be loaded under this contract or part of them become contrabrand of war whether absolute or conditional or liable to confiscation or detention according to international law or the proclamation of any of the belligerent powers each party to have the option of cancelling this contract as far as such goods are concerned, and contraband goods already loaded to be then discharged either at the port of loading, or if the voyage has already commenced, at the nearest safe place at the expense of the Cargo-Owners. Owners to have the right to fill up with other goods instead of the contraband.

Should any port where the vessel has to load under this Charter be blockaded the contract to be null and void with regard to the goods to be shipped at such port.

No Bills of Lading to be signed for any blockaded port, and if the port of destination be declared blockaded after Bills of Lading have been signed, Owners shall discharge the cargo either at the port of loading, against payment of the expenses of discharge, if the ship has not sailed thence, or, if sailed at any safe port on the way as ordered by Shippers or if no order is given at the nearest safe place against payment of full freight.

GENERAL ICE CLAUSE

Port of Loading

(a) In the event of the loading port being inaccessible by reason of ice when vessel is ready to proceed from her last port or at any time during the voyage or on vessel's arrival or in case frost sets in after vessel's arrival, the Captain for fear of being frozen in is at liberty to leave without cargo, and this Charter shall be null and void.

(b) If during loading the Captain, for fear of vessel being frozen in deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to any other port or ports with option of completing cargo for Owners' benefit for any port or ports including port ofdischarge. Any part cargo thus loaded under this Charter to be forwarded to destination at vessel's expense but against payment of freight, provided that no extra expenses be thereby caused to the Receivers, frieght being paid on quantity delivered (in proportion if lumpsum), all other conditions as per Charter.

(c) In case of more than one loading port and if one or more of the ports are closed by ice, the Captain or Owners to be at liberty either to load the part cargo at the open port and fill up elsewhere for their own account as under section b or to declare the Charter null and void unless Charterers agree to load full cargo at the open port.

(d) This Ice Clause not to apply in the Spring.

Port of discharge

(a) Should ice (except in the Spring) prevent vessel from reaching port of discharge Receivers shall have the option of keeping vessel waiting until the re-opening of navigation and paying demurrage or of ordering the vessel to a safe and immediately accessible port where she can safely discharge, without risk of detention by ice. Such orders to be given within 48 hours after Captain or Owners have given notice to Charterers of the impossibility of reaching port of destination.

(b) If during discharging the Captain for fear of vessel being frozen in deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to the nearest accessible port where she can safely discharge.

(c) On delivery of the cargo at such port, all conditions of the Bill of Lading shall apply and vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

APPENDIX B

Specimen General Ore Charterparty 1962—

Code Name : "GENORECON"

(Reproduced by the courtesy of Mr. H. Steuch, General Manager, Baltic & International Maritime Conference, Copenhagen.)

Adopted by
the Documentary Committee
of the Chamber of Shipping
of the United Kingdom

Issued 8/1/1963

Code Name
"GENORECON"

THE BALTIC AND INTERNATIONAL MARITIME CONFERENCE

GENERAL ORE CHARTER PARTY 1962

19

Note: Delete as necessary.

1. It is this day mutually agreed between

as { Owners / Voyage Charterers / Disponents } of the good

Vessel called of tons net

and tons gross register, classed

and of about tons of 1016 kilos d.w., now trading, and expected ready to

load under this chaterparty not before and not later than

and

as Charterers.

Port of loading.

2. That the said Vessel, being in every respect fitted for the voyage, shall with all convenient speed sail and proceed to and there load to her draft always safe and afloat, in the customary manner, as and where ordered by the Agents of the Shippers a full cargo of in bulk of tons of per cent. more or less in Master's/Owners' option, and being so loaded shall therewith proceed with all convenient speed to

LAW OF CARRIAGE BY SEA

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Port of discharge. 3.

or so near thereto as she may safely get, always safe and afloat as ordered on signing Bills of Lading, but the Charterers shall latest three days before Vessel's expected arrival at the port of discharge have liberty to require the Owners to order the Vessel to another port named herein or within the range specified herein by telegram or wireless, and there deliver the cargo as customary alongside any wharf and/or craft as directed by the Consignees.

Freight. 4. Freight at the rate of

per ton of

outturn weight or, in case of non-weighing at port of discharge, Bill of Lading weight, shall be paid by the Charterers in on unloading and right delivery of the cargo, to

in cash less advance and cost thereof as per Clause 6.

Dues and charges. 5. Dues and other charges levied against the cargo shall be paid by the Charterers, and dues and other charges levied against the Vessel shall be paid by the Owners.

Freight advance. 6. Cash for Vessel's use, if required, not exceeding one third of the calculated amount of freight, shall be advanced against Master's receipt at the port of loading, subject to 3 per cent. to cover interest, commission and cost of insurance.

Cancelling. 7. The Charterers shall have the option of cancelling the charterparty if the Vessel be not ready to load on or before the cancelling date as per Clause 1. If when the Vessel be ready to leave her last port of call (whether a discharging port or not), the Owners inform the Charterers by telegram that she cannot reach the loading port on or before the cancelling date, the Charterers shall declare by telegram within 24 hours from the receipt of such notice whether or not they cancel the charterparty.

Sailing telegrams.
Notice of expected arrival. 8. On sailing from the last port for the port of loading the Owners or the Master shall telegraph to , stating expected date of arrival. The Master shall also give radio notice 72 and 24 hours prior to Vessel's expected arrival at to

Loading.
Notice of readiness.
Commencement of laytime. 9. The laytime shall commence hours after notice of readiness has been given to the Charterers or their Agents at the port of loading. Such notice shall be given between a.m. and p.m., Sundays and holidays excluded, whether the Vessel is at or off the port and in berth or not. If the loading be commenced

Note. Delete *"by the loading conveyor belt(s)" if not applicable.*

earlier, laytime shall count from actual commencement. Any time lost because of the Vessel having to wait at or off the port for a berth shall count as laytime used in loading.

Loading time.

10. The Vessel shall be loaded in regular turn with all other Vessels. Laytime for loading shall be no more than running days of 24 hours, weather permitting, Sundays and national holidays excepted unless used. Any time lost on account of extra trimming required by the Owners shall not count.

Cost of loading.

11. The cargo shall be loaded and well trimmed *by the loading conveyor belt(s)* free of any risk, liability and expense whatsoever to the Owners ; any extra trimming required by the Owners shall be for their account.

Agents.

12. At port of loading the Master shall apply to and employ

paying the customary fees.

Tug boats.

13. At port of loading the Vessel shall employ tug boats belonging to

Discharge.

Notice of readiness. Commencement of laytime.

14. The laytime shall commence hours after the Vessel is in every respect ready to discharge and notice of readiness has been given to the Consignees or their Agents during office hours whether the Vessel is at or off the port and in berth or not. If the discharge be commenced earlier laytime shall count from actual commencement. Any time lost because of the Vessel having to wait at or off the port for a berth or having to wait for more than 24 hours for suitable tide to reach and enter the port shall count as laytime used in discharging.

Discharging time.

15. The cargo shall be discharged, weather permitting, in no more than

running days of 24 hours, Sundays and holidays and time between

excepted unless used.

Cost of discharging.

16. The cargo shall be discharged free of any risk, liability and expense whatsoever to the Owners.

Shifting cost.

17. If the Vessel is required to discharge at more than one berth, shifting costs other than Vessel's Officers' and Crew's overtime shall be for Charterers' account and time to count.

Agents.

18. At port of discharge the Master shall apply to and employ

as Agents, paying the customary fees.

Demurrage. 19. Demurrage shall be paid by the Charterers at the rate of

per day or pro rata for part of a day.

Overtime. 20. The Charterers or their Agents shall have liberty to require loading and/or discharging outside ordinary working hours and on Sundays and/or holidays, the Charterers paying all overtime expenses. Of such overtime at discharging port as may be ordered by port authorities 50 per cent. shall be paid by the Charterers and 50 per cent. by the Owners. Overtime earned by the Officers and Crew during loading and/or discharging of the cargo shall always be entirely for Owners' account.

Bad weather. 21. The Master shall cover at Owners' expense the hatch of each hold as soon as the loading into it has finished and, if the weather be wet, all hatches when the loading or discharging has finished for the day. He shall also during rain and snow cover all hatches not actually in use for loading or discharging.

Repairs of damage. 22. Time reasonably required to complete repairs of loading and/or discharging damage, if any, for which the Vessel is not responsible, shall count as laytime used in loading or discharging as the case may be.

Lighterage. 23. Lighterage, if required by the Charterers, shall be for their account and time used shall count.

Deviation. 24. The Vessel shall have liberty to call at any ports en route, to sail with or without pilots, to tow and to be towed, to assist Vessels in distress, and to deviate for the purpose of saving life and/or property or for bunkering purposes or to make any reasonable deviation. Any such movement shall not be deemed an infringement of this charterparty and the Owners shall not be liable for any loss or damage resulting therefrom.

Excluded ports. 25.

a) The Vessel shall not be ordered to nor bound to enter any port where fever or epidemics are prevalent or to which the Master, Officers and Crew by law are not bound to follow the Vessel. If for any of the above reasons the Vessel is unable to enter the loading port the chaterparty, or if the charterparty is for more than one voyage the voyage in question, shall be considered cancelled.

b) Should a quarantine be declared affecting the port of discharge prior to Vessel's entering, the Charterers shall request the Owners to order the Vessel to another port named herein or within the range specified herein where she can safely discharge, such orders to be given within 48 hours after the Master or the Owners have given notice to the Charterers of the quarantine at the port of discharge. If the Charterers cannot arrange safe discharge at a port named herein or within the range specified herein, they shall have the option of requesting the Owners to order the Vessel to another port and all conditions of this charterparty and of the Bill of Lading shall apply and the Vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance between the substituted port and the port named herein or within the range specified herein exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port shall be increased in proportion,

If the charterers fail to arrange a substitute port or to give orders within 48 hours as stated above, the detention, if any, to be for their account.

c) If the Vessel has already entered the loading or discharging port, detention by quarantine only on the Vessel shall not count as time used. Unless the Vessel is already on dermurrage half the time lost in loading or discharging by reason of epidemics ashore shall count as time used in loading or discharging as the case may be.

The Charterers, however, shall not be responsible for damages caused by the fact that the Owners cannot deliver their Vessel within laydays under a following contract.

Bills of Lading.

26. The Master shall sign Bills of Lading as printed below without prejudice to this charterparty. The Charterers shall indemnify the Owners if the Owners are held liable under the Bills of Lading in respect of any claim for which the Owners are not liable towards the Charterers under this charterparty.

Exceptions clause.

27. Notwithstanding anything herein contained no absolute warranty of seaworthiness is given or shall be implied. The Owners, in all matters arising under or affecting this contract, shall be entitled to the like rights and immunities as are contained in Article IV of the Hague Rules, dated Brussels, August 25th, 1924, the term "carrier" in the said Article being taken to mean Owners.

Lien.

28. The Owners shall have a lien on the cargo for any amount due under this charterparty and necessary costs of recovering same.

The Charterers shall remain responsible for any amount due to the Owners under this charterparty.

Insurance.

29. Any extra insurance on cargo on account of Vessel's age and/or flag and/or class shall be for Owners' account.

Ice.

30.

a) In the event of the loading port being inaccessible by reason of ice when the Vessel is ready to proceed from her last port or at any time during the voyage or on Vessel's arrival or in case frost sets in after Vessel's arrival, the Master for fear of the Vessel being frozen in is at liberty to leave without cargo, and the charterparty, or if the charterparty is for more than one voyage the voyage in question, shall be cancelled.

b) If during loading the Master, for fear of the Vessel being frozen in, deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to any other port or ports with option of completing cargo for Owners' benefit for any port or ports including port of discharge. Any part cargo thus loaded under this Charterparty to be forwarded to destination at Vessel's expense but against payment of freight, provided that no extra expenses be thereby caused to the Receivers, freight being paid on quantity delivered (in proportion if lumpsum), all other conditions as per charterparty.

c) In case of more than one loading port, and if one or more of the ports are closed by ice, the Master or the Owners to be at liberty either to load the part cargo at the open port and fill up elsewhere for their own account as under section b or to declare the charterparty, or if

the charterparty is for more than one voyage the voyage in question, cancelled unless the Charterers agree to load full cargo at the open port.

d) In case of ice preventing the Vessel from reaching or entering the port of discharge the Vessel shall have liberty to proceed to a near accessible port (within the same range if possible) as ordered by the Receivers and there deliver the cargo according to the terms of the charter-party. Unforeseen detention shall be for Charterers' account.

Substitution.

31. The Owners shall have liberty to substitute a Vessel of the same class or condition and of similar size, type and the same laydays and the same cancelling date on giving due notice hereof to the Charterers.

War risks.

32.

1. The Master shall not be required or bound to sign Bills of Lading for any blockaded port or for any port which the Master or the Owners in his or their discretion consider dangerous or impossible to enter or reach.
2. A) If any port of loading or of discharge named in this charterparty or to which the Vessel may properly be ordered pursuant to the terms of the Bills of Lading be blockaded, or
B) if owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions, or the operation of international law a) entry to any such port of loading or of discharge or the loading or discharge of cargo at any such port be considered by the Master or the Owners in his or their discretion dangerous or prohibited or b) it be considered by the Master or the Owners in his or their discretion dangerous or impossible for the Vessel to reach any such port of loading or of discharge—the Charterers shall have the right to order the Vessel or the cargo or such part of it as may be affected to be loaded or discharged at any other safe port of loading or of discharge within the range of loading or discharging ports respectively established under the provisions of the charterparty (provided such other port is not blockaded or that entry thereto or loading or discharge of cargo thereat is not in Master's or Owners' discretion dangerous or prohibited). If there is no range of loading ports agreed this charterparty to be considered cancelled for the voyage in question.
If part cargo has already been loaded and no range of loading ports being agreed, the Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.
If in respect of a port of discharge no orders be received from the Charterers within 48 hours after they or their Agents have received from the Owners a request for the nomination of a substitute port, the Owners shall then be at liberty to discharge the cargo at any safe port which they or the Master may in their or his discretion decide on (whether within the range of discharging ports established under the provisions of the charterparty or not) and such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment so far as cargo so discharged is concerned. In the event of the cargo being loaded or discharged at any such other port within the respective range of loading or discharging ports established under the provisions of the charterparty, the charterparty shall be read in respect of freight and all other conditions whatsoever as if the voyage performed were that originally designated. In the event. however, that the Vessel discharges the cargo at a port outside the

Range.

range of discharging ports established under the provisions of the charterparty, freight shall be paid as for the voyage originally designated and all extra expenses involved in reaching the actual port of discharge and/or discharging the cargo thereat shall be paid by the Charterers or cargo owners. In this latter event the Owners shall have a lien on the cargo for all such extra expenses.

3. The Vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destinations, zones, waters, delivery or in any other wise whatsoever given by the government of the nation under whose flag the Vessel sails or any other government or local authority including any de facto government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or authority or by any committee or person having under the terms of the war risks insurance on the Vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or recommendations, anything is done or is not done such shall not be deemed a deviation.

If by reason of or in compliance with any such direction or recommendation the Vessel does not proceed to the port or ports of discharge originally designated or to which she may have been ordered pursuant to the terms of the Bills of Lading, the Vessel may proceed to any safe port of discharge which the Master or the Owners in his or their discretion may decide on and there discharge the cargo. Such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment and the Owners shall be entitled to freight as if discharge has been effected at the port or ports originally designated or to which the Vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port of discharge shall be paid by the Charterers and/or cargo owners and the Owners shall have a lien on the cargo for freight and all such expenses.

War clause.

33.

a) In the event of war involving two or more of the following countries, namely

or the country of the flag of the Vessel, either party to have the right to cancel this charterparty.

b) If a world war breaks out or a situation arises that is similar to a world war, either party shall have the right to cancel this charterparty.

General Average.

34. General average shall be adjusted, stated and settled according to the York-Antwerp Rules 1950.

"Gencon" general strike clause.

35. Neither the Charterers nor the Owners shall be responsible for the consequences of any strikes or lock-outs preventing or delaying the fulfilment of any obligations under this contract.

Note : (a) and (b) are alternatives and the one not agreed upon is to be deleted.

If there is a strike or lock-out affecting the loading of the cargo, or any part of it, when the Vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, the Master or the Owners may ask the Charterers to declare that they agree to reckon the laydays as if there were no strike or lock-out. Unless the Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, the Owners shall have the option of cancelling this contract.

If part-cargo has already been loaded, the Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.

If there is a strike or lock-out affecting the discharge of the cargo on or after Vessel's arrival at or off the port of discharge and same has not been settled within 48 hours, the Receivers shall have the option of keeping the Vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging, or of ordering the Vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after the Master or the Owners have given notice to the Charterers of the strike or lock-out affecting the discharge. On delivery of the cargo at such port, all conditions of this charterparty and of the Bills of Lading shall apply and the Vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

Brokerage. 36. A commission of per cent. on the gross amount of freight calculated on the Bill of Lading weight and deadfreight is payable by the Owners to on shipment of the cargo.

Jurisdiction. 37. This contract shall be governed by law.

Arbitration. 38. Any disputes arising under this contract shall be settled by arbitration in in accordance with the arbitration law and procedure prevailing there.

Note : Clauses 37 and 38 are optional and may be deleted or amended.

BILL OF LADING

to be used for all shipments chartered on the "Genorecon" Charter Party.
Code Name : "Genoreconbill".
Issued by The Baltic and International Maritime Conference.

Shipped at in apparent good order and condition by

on board the good Vessel called the

for carriage to or to such

other port as the Charterers, in accordance with Clause 3 of the charterparty, order the Vessel or so near thereto as she may safely get always safe and afloat, the following quantity of in bulk

which shall be delivered in the like good order and condition at the aforesaid Port unto

or his or their order. Freight shall be paid as per charterparty covering this shipment.

All the terms, conditions, liberties, and exceptions of the said charterparty are herewith incorporated, including jurisdiction and arbitration clauses.

The Hague Rules contained in the International Convention for the Unification of certain Rules relating to Bills of Lading, dated Brussels the 25th of August 1924, as enacted in the country of destination shall apply to this contract. When no such enactment is in force in the country of destination the corresponding legislation of the country of shipment shall apply, but if no such legislation is in force in either country then the British Carriage of Goods by Sea Act 1924 shall apply. The Carrier and the Charterers are entitled to the benefit of all privileges, rights and immunities contained in such enactment as if the same were herein specifically set out. If any of the terms, conditions, liberties and exceptions in the said charterparty shall be repugnant to the enactment so applied to any extent the same shall be void to that extent, but no further.

The Carrier shall in no case be responsible for loss of or damage to cargo arisen prior to loading and after discharging.

General Average shall be adjusted, stated, and settled according to York-Antwerp Rules 1950.

Amended Jason Clause. In the event of accident, danger, damage, or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Carrier is not responsible by statute, contract, or otherwise, the cargo, Shippers, Consignees, or owners of the cargo shall contribute with the Carrier in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo. If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully as if the salving ship or ships belong to strangers.

Both-to-Blame Collision Clause. If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, Mariner, Pilot or the servants of the Carrier in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her Owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying ship or her owners to the owners of said cargo and set-off, recouped or recovered by the other or non-carrying ship or her Owners as part of their claim against carrying Vessel or Carrier. The foregoing provisions shall also apply where the Owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.

Weight, quality, condition, and value unknown.

From

I have received on account of
my freight the sum of
Say

---

on which insurance and interest have been paid by
Shippers

Arrived : o'clock

Notice of readiness given : ,,

Loading commenced : ,,

Loading finished : ,,

Draft : Fore Aft

In WITNESS whereof, I, the Master of the said Vessel, have signed
Bills of Lading all of this tenor and date, any one of which being accomplished the others to be void.

, the 19

APPENDIX C

Specimen Uniform Time-Charter—

Code Name : "BALTIME 1939"

(Reproduced by the courtesy of Mr. H. Steuch, General Manager, Baltic & International Maritime Conference, Copenhagen.)

Adopted by
the Documentary Committee
of the Chamber of Shipping
of the United Kingdom.

Issued 8/2/1909
Amended 13/3/1911
Amended 6/3/1912
Amended 10/6/1920
Amended 1/1/1939
Amended 1/1/1950

THE BALTIC AND INTERNATIONAL MARITIME CONFERENCE

(Formerly The Baltic and White Sea Conference)

UNIFORM TIME-CHARTER

Code-Name

Baltime

1939

19

Description of Vessel

IT IS THIS DAY MUTUALLY AGREED between Owners 1
of the Vessel called of ——— tons gross / tons net Register, 2
classed of indicated horse power, 3
carrying about tons deadweight on Board of Trade summer freeboard inclusive 4
of bunkers, stores, provisions and boiler water, having as per builder's plan cubic-feet 5
grain / bale capacity, exclusive of permanent bunkers, which contain about tons, and fully loaded capable 6
of steaming about knots in good weather and smooth water on a consumption of about 7
tons best Welsh coal, or about tons oil-fuel, now 8
and 9

Charterers of Charterers, as follows :

Period 1. The Owners let, and the Charterers hire the Vessel for a period of calendar months from the time (not a Sunday or a legal Holiday unless taken over) the Vessel is delivered and placed at the disposal of the Charterers between 9 a. m. and 6 p. m., or between 9 a. m. and 2 p. m. if on Saturday, at

Port of delivery

in such available berth where she can safely lie always afloat, as the Charterers may direct, she being in every way fitted for ordinary cargo service.

Time of delivery The Vessel to be delivered

Trade 2. The Vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports or places where she can safely lie always afloat within the following limits :

No live stock nor injurious, inflammable or dangerous goods (such as acids, explosives, calcium carbide, ferro silicon, naphtha, motor spirit, tar or any of their products) to be shipped.

Owners to provide 3. The Owners to provide and pay for all provisions and wages, for insurance of the Vessel, for all deck and engine-room stores and maintain her in a thoroughly efficient state in hull and machinery during service.

The Owners to provide one winchman per hatch. If further winchmen are required, or if the stevedores refuse or are not permitted to work with the Crew, the Charterers to provide and pay qualified shore-winchmen.

Charterers to provide

4. The Charterers to provide and pay for all coals, including galley coal, oil-fuel, water for boilers, port charges, pilotages (whether compulsory or not), canal steersmen, boatage, lights, tug-assistance, consular charges (except those pertaining to the Master, Officers and Crew), canal, dock and other dues and charges, including any foreign general municipality or state taxes, also all dock, harbour and tonnage dues at the ports of delivery and re-delivery (unless incurred through cargo carried before delivery or after re-delivery), agencies, commissions, also to arrange and pay for loading, trimming, stowing (including dunnage and shifting boards, excepting any already on board), unloading, weighing, tallying and delivery of cargoes, surveys on hatches, meals supplied to officials and men in their service and all other charges and expenses whatsoever including detention and expenses through quarantine (including cost of fumigation and disinfection).

All ropes, slings and special runners actually used for loading and discharging and any special gear, including special ropes, hawsers and chains required by the custom of the port for mooring to be for the Charterers' account. The Vessel to be fitted with winches, derricks, wheels and ordinary runners capabie of handling lifts up to 2 tons.

Bunkers

5. The Charterers at port of delivery and the Owners at port of re-delivery to take over and pay for all coal or oil-fuel remaining in the Vessel's bunkers at current price at the respective ports. The Vessel to be re-delivered with not less than tons and not exceeding tons of coal or oil-fuel in the Vessel's bunkers.

Hire

6. The Charterers to pay as hire :
per 30 days, commencing in accordance with clause 1 until her re-delivery to the Owners.

Payment

Payment of hire to be made in cash, in without discount, every 30 days, in advance.

In default of payment the Owners to have the right of withdrawing the Vessel from the service of the Charterers, without noting any protest and without interference by any court or any other formality whatsoever and without prejudice to any claim the Owners may otherwise have on the Charterers under the Charter.

Re-delivery

7. The Vessel to be re-delivered on the expiration of the Charter in the same good order as when delivered to the Charterers (fair wear and tear excepted) at an ice-free port in the Charterers' option in between 9 a. m. and 6 p. m. and 9 a. m. and 2 p. m. on Saturday, but the day of re-delivery shall not be a Sunday or legal Holiday.

Notice

The Charterers to give the Owners not less than ten days' notice at which port and on about which day the Vessel will be re-delivered.

Should the Vessel be ordered on a voyage by which the Charter period will be exceeded the Charterers to have the use of the Vessel to enable them to complete the voyage, provided it could be reasonably calculated that the voyage would allow re-delivery about the time fixed for the termination of the Charter, but for any time exceeding the termination date the Charterers to pay the market rate if higher than the rate stipulated herein.

Cargo Space

8. The whole reach and burthen of the Vessel, including lawful deck-capacity to be at the Charterers' disposal, reserving proper and sufficient space for the Vessel's Master, Officers, Crew, tackle, apparel, furniture, provisions and stores.

Master

9. The Master to prosecute all voyages with the utmost despatch and to render customary assistance with the Vessels' Crew. The Master to be under the orders of the Charterers as regards employment agency, or other arrangements. The Charterers to indemnify the Owners against all consequences or liabilities arising from the Master, Officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders, as well as from any irregularity in the Vessel's papers or for overcarrying goods. The Owners not to be responsible for shortage, mixture, marks, nor for number of pieces or packages, nor for damage to or claims on cargo caused by bad stowage or otherwise.

If the Charterers have reason to be dissatisfied with the conduct of the Master, Officers, or Engineers, the Owners, on receiving particulars of the complaint, promptly to investigate the matter, and, if necessary and practicable, to make a change in the appointments.

Directions and Logs

10. The Charterers to furnish the Master with all instructions and sailing directions and the Master and Engineer to keep full and correct logs accessible to the Charterers or their Agents.

Suspension of Hire etc.

11. (A) In the event of drydocking or other necessary measures to maintain the efficiency of the Vessel, deficiency of men or Owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing for more than twentyfour consecutive hours, no hire to be paid in respect of any time lost thereby during the period in which the Vessel is unable to perform the service immediately required. Any hire paid in advance to be adjusted accordingly.

(B) In the event of the Vessel being driven into port or to anchorage through stress of weather, trading to shallow harbours or to rivers or ports with bars or suffering an accident to her cargo, any detention of the Vessel and/or expenses, resulting from such detention to be for the Charterers' account even if such detention and/or expenses, or the cause by reason of which either is incurred, be due to, or be contributed to by, the negligence of the Owners' servants.

Cleaning Boilers

12. Cleaning of boilers whenever possible to be done during service, but if impossible the Charterers to give the Owners necessary time for cleaning. Should the Vessel be detained beyond 48 hours hire to cease until again ready.

Responsibility and Exemption

13. The Owners only to be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter and for loss or damage to goods on board, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the Vessel sea-worthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager. The Owners not to be responsible in any other case nor for damage or delay whatsoever

and howsoever caused even if caused by the neglect or default of their servants. The Owners not to be liable for loss or damage arising or resulting from strikes, lock-outs or stoppage or restraint of labour (including the Master, Officers or Crew) whether partial or general.

The Charterers to be responsible for loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter or by improper or careless 'bunkering or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants.

Advances

14. The Charterers or their Agents to advance to the Master, if required, necessary funds for ordinary disbursements for the Vessel's account at any port charging only interest at 6 per cent p. a., such advances to be deducted from hire.

Excluded Ports

Ice

15. The Vessel not to be ordered to nor bound to enter : (a) any place where fever or epidemics are prevalent or to which the Master, Officers and Crew by law are not bound to follow the Vessel b) any ice-bound place or any place where lights, lightships, marks and buoys are or are likely to be withdrawn by reason of ice on the Vessel's arrival or where there is risk that ordinarily the Vessel will not be able on account of ice to reach the place or to get out after having completed loading or discharging. The Vessel not to be obliged to force ice. If on account of ice the Master considers it dangerous to remain at the loading or discharging place for fear of the Vessel being frozen in and/or damaged, he has liberty to sail to a convenient open place and await the Charterers' fresh instructions.

Unforeseen dentention through any of above causes to be for the Charterer's account.

Loss of Vessel

16. Should the Vessel be lost or missing, hire to cease from the date when she was lost. If the date of loss cannot be ascertained half hire to be paid from the date the Vessel was last reported until the calculated date of arrival at the destination. Any hire paid in advance to be adjusted accordingly.

Overtime

17. The Vessel to work day and night if required. The Charterers to refund the Owners their outlays for all overtime paid to Officers and Crew according to the hours and rates stated in the Vessel's articles.

Lien

18. The Owners to have a lien upon all cargoes and sub-freights belonging to the Time-Charterers and any Bill of Lading freight for all claims under this Charter, and the Charterers to have a lien on the Vessel for all moneys paid in advance and not earned.

Salvage

19. All salvage and assistance to other vessels to be for the Owners' and the Charterers' equal benefit after deducting the Master's and Crew's proportion and all legal and other expenses including hire paid under the charter for time lost in the salvage, also repairs of damage and coal or oil-fuel consumed. The Charterers to be bound by all measures taken by the Owners in order to secure payment of salvage and to fix its amount.

Sublet

20. The Charterers to have the option of subletting the Vessel, giving due notice to the Owners, but the original Charterers always to remain responsible to the Owners for due performance of the Charter.

War

21. (A) The Vessel unless the consent of the Owners be first obtained not to be ordered nor continue to any place or on any voyage nor be used on any service which will bring her within a

zone which is dangerous as the result of any actual or threatened act of war, war hostilities, warlike operations, acts of piracy or of hostility or malicious damage against this or any other vessel or its cargo by any person, body or State whatsoever, revolution, civil war, civil commotion or the operation of international law, nor be exposed in any way to any risks or penalties whatsoever consequent upon the imposition of Sanctions, nor carry any goods that may in any way expose her to any risks of seizure, capture, penalties or any other interference of any kind whatsoever by the belligerent or fighting powers or parties or by any Government or Ruler.

(B) Should the Vessel approach or be brought or ordered within such zone, or be exposed in any way to the said risks, (1) the Owners to be entitled from time to time to insure their interests in the Vessel and/or hire against any of the risks likely to be involved thereby on such terms as they shall think fit, the Charterers to make a refund to the Owners of the premium on demand; and (2) notwithstanding the terms of clause 11 hire to be paid for all time lost including any lost owing to loss of or injury to the Master, Officers, or Crew or to the action of the Crew in refusing to proceed to such zone or to be exposed to such risks.

Section (C) is optional and should be deleted unless agreed

(C) In the event of the wages of the Master, Officers and/or Crew or the cost of provisions and/or stores for deck and/or engine room and/or insurance premiums being increased by reason of or during the existence of any of the matters mentioned in section (A) the amount of any increase to be added to the hire and paid by the Charterers on production of the Owners' account therefor, such account being rendered monthly.

(D) The Vessel to have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or in any other wise whatsoever given by the Government of the nation under whose flag the Vessel sails or any other Government or any person (or body) acting or purporting to act with the authority of such Government or by any committee or person having under the terms of the war risks insurance on the Vessel the right to give any such orders or directions.

(E) In the event of the nation under whose flag the Vessel sails becoming involved in war, hostilities, warlike operations, revolution, or civil commotion, both the Owners and the Charterers may cancel the Charter and, unless otherwise agreed, the Vessel to be redelivered to the Owners at the port of destination or, if prevented through the provisions of section (A) from reaching or entering it, then at a near open and safe port at the Owners' option, after discharge of any cargo in board.

(F) If in compliance with the provisions of this clause anything is done or is not done, such not to be deemed a deviation.

Cancelling

22. Should the Vessel not be delivered by the day of 19 , the Charteres to have the option of cancelling.

If the Vessel cannot be delivered by the cancelling date, the Charterers, if required, to declare within 48 hours after receiving notice thereof whether they cancel or will take delivery of the Vessel.

Arbitration

23. Any dispute arising under the Charter to be referred to arbitration in London (or such other place as may be agreed) one Arbitrator to be nominated by the Owners and the other by the Charterers, and in case the Arbitrators shall not agree then to the decision of an Umpire to be appointed by them, the award of the Arbitrators or the Umpire to be final and binding upon both parties.

General Average

24. General Average to be settled according to York/Antwerp Rules, 1950. Hire not to contribute to General Average.

Commission

25. The Owners to pay a commission of to on any hire paid under the Charter, but in no case less than is necessary to cover the actual expenses of the Brokers and a reasonable fee for their work. If the full hire is not paid owing to breach of Charter by either of the parties the party liable therefor to indemnify the Brokers against their loss of commission.

Should the parties agree to cancel the Charter, the Owners to indemnify the Brokers against any loss of commission but in such case the commission not to exceed the brokerage on one year's hire.

APPENDIX D

Specimen Bill of Lading to be used with Charterparties—

Code Name : "CONGENBILL"

(Reproduced by the courtesy of Mr. H. Steuch, General Manager, Baltic & International Maritime Conference, Copenhagen.)

Shipper

BILL OF LADING

B/L No.

To be used with Charter-Parties.
Code Name "Congenbill".
Edition 1964.

Reference No.:

Issued for use in International Trade
by
The Baltic and International
Maritime Conference.

Consigned to order of

Vessel | Port of loading

Port of discharge | Number of original Bs/L

Shipper's description of goods | Gross weight

(of which on deck at Shipper's risk ; the Carrier not being responsible for loss or damage howsoever arising)

Freight payable as per

CHARTER-PARTY dated.....

FREIGHT ADVANCE.

Received on account of freight :

.....

Time used for loading.....days.....hours.

SHIPPED at the Port of Loading in apparent good order and condition on board the Vessel for carriage to the Port of Discharge or so near thereto as she may safely get the goods specified above.

All the terms, conditions, liberties, and exceptions of the Charter-Party are herewith incorporated.

This Bill of Lading shall have effect subject to the provisions of any legislation relating to the carriage of goods by sea which incorporates the rules relating to Bills of Lading contained in the International Convention, dated Brussels 25th August, 1924 and which is compulsorily applicable to the contract of carriage herein contained. Such legislation shall be deemed to be incorporated herein, but nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities thereunder. If any term of this Bill of Lading be repugnant to any extent to any legislation by this clause incorporated, such term shall be void to that extent but no further. Nothing in this Bill of Lading shall operate to limit or deprive the Carrier of any statutory protection or exemption from, or limitation of liability.

Weight, measure, quality, quantity, condition, contents and value unknown.

IN WITNESS whereof the Master or Agent of the said Vessel has signed the number of Bills of Lading indicated above all of this tenor and date, any one of which being accomplished the others shall be void.

Place and date of issue

Signed by

APPENDIX E

Specimen Liner Bill of Lading—

Code Name : "CONLINEBILL"

(Reproduced by the courtesy of Mr. H. Steuch, General Manager, Baltic & International Maritime Conference, Copenhagen.)

LINER BILL OF LADING

(Liner terms approved by The Baltic International Maritime Conference)
Code Name "CONLINEBILL"

Amended January 1st, 1950
Amended August 1st, 1952

1. Definition.

Wherever the term "Merchant" is used in this Bill of Lading, it shall be deemed to include the Shipper, the Receiver, the Consignee, the Holder of the Bill of Lading and the Owner of the cargo.

2. Paramount Clause.

The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924, as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.

3. Jurisdiction.

Any dispute arising under this Bill of Lading shall be decided in the country where the Carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein.

4. Period of Responsibility.

The Carrier or his Agent shall not be liable for loss of or damage to the goods during the period before loading and after discharge from the vessel, howsoever such loss or damage arises.

5. The Scope of Voyage.

The contract is for liner service and the voyage herein undertaken shall include usual or customary or advertised, ports of call whether named in this contract or not, also ports in or out of the advertised geographical, usual or ordinary route, or order, even though in proceeding thereto the vessel may sail beyond the port of discharge or in a direction contrary thereto, or depart from the direct or customary route. The vessel may call at any port for the purpose of the current voyage or of a prior or subsequent voyage. The vessel may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once; may, either with or without the goods onboard, and before or after proceeding towards the port of discharge, adjust compasses, dry-dock, go on ways or to repair yards, shift berths, undergo degaussing, wiping or similar measures, take fuel or stores, land stowaways, remain in port, sail without pilots, tow and be towed, and save or attempt to save life or property, and all of the foregoing are included in the contract voyage.

6. Substitution of Vessel, Transhipment and Forwarding.

Whether expressly arranged beforehand or otherwise, the Carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels either belonging to the Carrier or others, or by other means of transport, proceeding either directly or indirectly to such port and to carry the goods or part of them beyond their port of destination, and to tranship, land and store the goods either on shore or afloat and reship and forward the same at Carrier's expense but at Merchant's risk. When the ultimate destination at which the Carrier may have engaged to deliver the goods is other than the vessel's port of discharge, the Carrier acts as Forwarding Agent only.

The responsibility of the Carrier shall be limited to the part of the transport performed by him on vessels under his management and no claim will be acknowledged by the Carrier for damage or loss arising during any other part of the transport even though the freight for the whole transport has been collected by him.

7. Lighterage.

Any lightering in or off ports of loading or ports of discharge to be for the account of the Merchant.

8. Loading, Discharging and Delivery

of the cargo shall be arranged by the Carrier's Agent unless otherwise agreed.

Landing, storing and delivery shall be for the Merchant's account.

Loading and discharging may commence without previous notice.

The Merchant or his Assign shall tender the goods when the vessel is ready to load and as fast as the vessel can receive and—but only if required by the Carrier—also outside ordinary working hours notwithstanding any custom of the port. Otherwise the Carrier shall be relieved of any obligation to load such cargo and the vessel may leave the port without further notice and deadfreight is to be paid.

The Merchant or his Assign shall take delivery of the goods and continue to receive the goods as fast as the vessel can deliver and—but only if required by the Carrier—also outside ordinary working hours notwithstanding any custom of the port. Otherwise the Carrier shall be at liberty to discharge the goods and any discharge to be deemed a true fulfilment of the contract, or alternatively to act under clause 16.

The Merchant shall bear all overtime charges in connection with tendering and taking delivery of the goods as above.

If the goods are not applied for within a reasonable time, the Carrier may sell the same privately or by auction.

The Merchant shall accept his reasonable proportion of unidentified loose cargo.

9. Live Animals, Plants and Deck Cargo

shall be carried subject to the Hague Rules as referred to in clause 2 hereof with the exception that the Carrier shall not be liable for any loss or damage resulting from any act, neglect or default of his servants in the management of such animals, plants and deck cargo.

10. Options.

The port of discharge for optional cargo must be declared to the vessel's Agents at the first of the optional ports not later than 48 hours before the vessel's arrival there. In the absence of such declaration the Carrier may elect to discharge at the first or any other optional port and the contract of carriage shall then be considered as having been fulfilled. Any option can be exercised for the total quantity under this Bill of Lading only.

11. Freight and Charges.

(a) Prepayable freight, whether actually paid or not, shall be considered as fully earned upon loading and non-returnable in any event. The Carrier's claim for any charges under this contract shall be considered definitely payable in like manner as soon as the charges have been incurred.
Interest as 5 per cent. shall run from the date when freight and charges are due.

(b) The Merchant shall be liable for expenses of fumigation and of gathering and sorting loose cargo and of weighing onboard and expenses incurred in repairing damage to and replacing of packing due to excepted causes and for all expenses caused by extra handling of the cargo for any of the aforementioned reasons.

(c) Any dues, duties, taxes and charges which under any denomination may be levied on any basis such as amount of freight, weight of cargo or tonnage of the vessel shall be paid by the Merchant.

(d) The Merchant shall be liable for all fines and/or losses which the Carrier, vessel or cargo may incur through non-observance of Custom House and/or import or export regulations.

(e) The Carrier is entitled in case of incorrect declaration on contents, weights, measurements or value of the goods to claim double the amount of freight which would have been due if such declaration had been correctly given. For the purpose of ascertaining the actual facts the Carrier reserves the right to obtain from the Merchant the original invoice and to have the contents inspected and the weight, measurement or value verified.

12. Lien.

The Carrier shall have a lien for any amount due under this contract and costs of recovering same and shall be entitled to sell the goods privately or by auction to cover any claims.

13. Delay.

The Carrier shall not be responsible for any loss sustained by the Merchant through delay of the goods unless caused by the Carrier's personal gross negligence.

14. General Average and Salvage.

General Average to be adjusted at any port or place at Carrier's option and to be settled according to the York-Antwerp Rules 1950. In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Carrier is not responsible by statute, contract or otherwise, the Merchant shall contribute with the Carrier in General Average to the payment of any sacrifice, losses or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving vessel is owned or operated by the Carrier, salvage shall be paid for as fully as if the salving vessel or vessels belonged to strangers.

15. Both-to-blame Collision Clause. (This clause to remain in effect even if unenforcible in the Courts of the United States of America).

If the vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, negligence or default of the Master, Mariner, Pilot or the servants of the Carrier in the navigation or in the management of the vessel, the Merchant will indemnify the Carrier against all loss or liability to the other or non-carrying vessel or her Owner in so far as such loss or liability represents loss of or damage to or any claim whatsoever of the Owner of the said goods paid or payable by the other or non-carrying vessel or her Owner to the Owner of said cargo and set-off, or recouped or recovered by the other or non-carrying vessel or her Owner as part his claim against the carrying vessel or Carrier. The foregoing provisions shall also apply where the Owner, operator or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

16. Government directions, War, Epidemics, Ice, Strikes, etc.

(a) The Master and the Carrier shall have liberty to comply with any order or directions or recommendations in connection with the transport under this contract given by any Government or Authority, or anybody acting or purporting to act on behalf of such Government or Authority, or having under the terms of the insurance on the vessel the right to give such orders or directions or recommendations.

(b) Should it appear that the performance of the transport would expose the vessel or any goods onboard to risk of seizure or damage or delay, resulting from war, warlike operations blockade, riots, civil commotions or piracy, or any person onboard to the risk of loss of life or freedom, or that any such risk has increased, the Master may discharge the cargo at port of loading or any other sale and convenient port.

(c) Should it appear that epidemics, quarantine, ice—labour troubles, labour obstructions, strikes, lockouts, any of which onboard or on shore—difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the Master may discharge the cargo at port of loading or any other safe and convenient port.

(d) The discharge under the provisions of this clause of any cargo for which a Bill of Lading has been issued shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the Merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods.

(e) If any situation referred to in this clause may be anticipated, or if for any such reason the vessel cannot safely and without delay reach or enter the loading port or must undergo repairs, the Carrier may cancel the contract before the Bill of Lading is issued.

(f) The Merchant shall be informed if possible.

17. Identity of Carrier.

The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all

limitations of, and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other.

It is further understood and agreed that as the Line, Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage, nor a Carrier not bailee of the goods.

ADDITIONAL CLAUSES.

A. Demurrage.

The Carrier shall be paid demurrage at the daily rate of per ton of the vessel's gross register tonnage if the vessel is not loaded or discharged with the dispatch set out in clause 8, any delay in waiting for berth at or off port to count.

Provided that if the delay is due to causes beyond the control of the Merchant, 24 hours shall be deducted from the time on demurrage.

Each Merchant shall be liable towards the Carrier for a proportionate part of the total demurrage due, based upon the total freight on the goods to be loaded or discharged at the port in question.

No Merchant shall be liable in demurrage for any delay arisen only in connection with goods belonging to other Merchants.

The demurrage in respect of each parcel shall not exceed its freight.

B. Scandinavian Trade. Shipment between ports in Denmark, Finland, Norway and Sweden.

Where Section 122 of the Danish, Finnish, Norwegian or Swedish Maritime Codes applies the Cafrier takes all reservations as to responsibility permissible under Sections 122 and 123 of the said Codes.

C. U. S. Trade. Period of Responsibility.

In case the Contract evidenced by this Bill of Lading is subject to the U.S. Carriage of Goods by Sea Act, then the provisions stated in said Act shall govern before loading and after discharge and throughout the entire time the goods are in the Carrier's custody.

Shipper

LINER BILL OF LADING

B/L No.

Reference No.

Consigned to order of

Notify address

Vessel | Port of loading

Port of discharge | Freight payable at | Number of original Bs/L

Marks and Nos.	Number and kind of packages : description of goods	Gross weight	Measurement

SHIPPED on board in apparent good order and condition, weight, measure, marks, numbers, quality, contents and value unknown, for carriage to the port of discharge or so near thereunto as the Vessel may safely get and lie always afloat, to be delivered in the like good order and condition at the aforesaid Port unto Consignees or their Assigns, they paying freight as per note on the margin plus other charges incurred in accordance with the provisions contained in this Bill of Lading.

In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its stipulations on both pages, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the Merchant.

One original Bill of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.

IN WITNESS whereof the Master of the said Vessel has signed the number of original Bills of Lading stated above, all of this tenor and date, one of which being accomplished, the others to stand void.

Place and date of issue

Signed (for the Master) by

APPENDIX F

Specimen Bill of Lading of Great Eastern Shipping Co. Ltd.

(Reproduced by the courtesy of the Bombay office of the Company)

GREAT EASTERN LINE

THE GREAT EASTERN SHIPPING COMPANY, LIMITED, BOMBAY
(Incorporated in India)

Registered Office:
60 Mahatma Gandhi Road
Bombay, 1

FORWARDING AGENT—REFERENCES

EXPORT DEC. NO.

U. S. Pacific Coast General Agents
GENERAL STEAMSHIP
SAN FRANCISCO, CALIFORNIA

BILL OF LADING

LOS ANGELES
PORTLAND
SEATTLE
VANCOUVER, B. C.
Empire Shipping Co., Ltd.

SHIPPER

CONSIGNED TO

ORDER OF

ADDRESS ARRIVAL NOTICE TO (Without Liability to the Carriers, see Clause 11 hereof.)

ALSO NOTIFY

VESSEL | VOYAGE NO. | FLAG

PIER | PORT OF LOADING

PORT OF DISCHARGE *(Where goods are to be delivered to consignee or on-carrier)*

FOR TRANSSHIPMENT TO *(If goods are to be transshipped or forwarded at port of discharge)*

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	MEASUREMENT	GROSS WEIGHT

ORIGINAL

/ CHARGE	WEIGHT	MEAS.	RATE	AMOUNT

TOTAL **PREPAID**

TOTAL **COLLECT**

LET SHIPPERS SHOULD CAREFULLY READ THIS BILL OF LADING, AS IT CONSTITUTES THE CONTRACT BETWEEN THEM (AS OWNERS, OR AGENTS OF THE OWNERS OF THE GOODS) AND CARRIERS.

RECEIVED FOR SHIPMENT the following described goods or packages said to contain goods, in apparent good order and condition (continued below)

IN WITNESS WHEREOF the Master or Agent of said vessel hath affirmed to _____ Bills of Lading, all of this tenor and date, one of which being accomplished, the other to stand void.

DATED

AT _____ ON _____

FOR AND BEHALF OF
THE GREAT EASTERN SHIPPING CO., LTD.
By General Steamship Corporation Ltd.
as Agents

B/L NO.

BY _____

(continued from above) unless otherwise indicated herein to, be transported to the port of discharge or transshipment, or so near thereunto as the vessel may always safely get and leave, always afloat at all stages and conditions of water and weather and there to be delivered or transshipped, all subject to all the terms, conditions and exceptions set out on this page and on the reverse side which shall govern the relations whatever they may be, between the parties herein included in the words "shipper" and "carrier" in every contingency whenever, wherever and however occurring and even in case of deviation or unseaworthiness of the ship at the time of lading, inception of the voyage or subsequently and none of the terms, conditions and exceptions of this bill of loading shall be considered to have been waived unless by an express written waiver signed by a duly authorized agent of the carrier.
It is further understood and agreed that as the line, company or agency which has executed this Bill of Lading as agent for the master or owner, as the case may be, is not a principal in the transaction but merely an agent, said line, company or agency shall be under no liability arising out of or by virtue of the contract of carriage nor as carrier or bailee of the goods.
All limitation of liability and other provisions herein contained shall inure not only to the benefit of the Carrier, his Vessel, Agents, Employees and other Representatives, but also to the benefit of any independent contractor performing services to the goods.

This contract subject to all the stipulations and agreements set forth on either side hereof.

And finally, in accepting this Bill of Lading, the shipper, owner, and consignee of the goods and the holder of the Bill of Lading agree to be bound by all of the stipulations, exceptions and conditions, whether written or printed, as fully as if they were signed by such shipper, owner, consignee or holder and it is hereby mutually stipulated and agreed that this Bill of Lading shall have the effect of a special contract.

FURTHER STIPULATIONS AND AGREEMENTS CONTINUED ON THE REVERSE HEREOF.

Shipper.

CLAUSE PARAMOUNT. All the terms, provisions and conditions of the Indian Carriage of Goods by Sea Act, 1925, and the Schedule thereto are to apply to the contract contained in the Bill of Lading, and the Company are to be entitled to the benefit of privileges, rights and immunities contained in such Act, and the Schedule thereto as if the same were herein specifically set out. If anything herein contained be inconsistent with the said provisions it shall to the extent of such inconsistency and no further be null and void. It is hereby expressly further agreed in pursuance of the provisions of Article 7 of the Schedule to the said Act, that the carriers' liability, prior to the loading on, and subsequent to the discharge from the ship shall be governed by the said Indian Carriage of Goods by Sea Act. Notwithstanding the foregoing, for cargo shipped from the United States any reference in this bill of lading to the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, shall nevertheless also be applicable.

1. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the U.S. 1936; and of the Carriage of Goods by Sea Act and schedule in force where the bill of lading may be issued. All the provisions of such Act or Acts are incorporated herein and except as may be specifically provided herein shall govern throughout the entire time that the goods are in the custody of the carrier. Nothing herein contained shall be considered a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilites or liabilities under said Act or Acts.. This bill of lading is also subject to and incorporates the provisions of Secs. 4281-4286, 4289 of the United States Revised Statutes and amendments thereto. The carrier shall not be liable in any capacity whatever for any delay, non-delivery, misdelivery, loss of, damage to or charges against the goods occurring while they are not in the carrier's custody. The carrier shall be entitled to all limitations and exemptions from liability in the laws of any country whose laws apply. This bill of lading is a contract with the actual owner or demise or time charterer of the vessel as principal. The company or line issuing this bill of lading, if not the owner or demise or time charterer, is agent only for such owner or charterer and shall not be under any personal liability whatever. If, however, it shall be adjudged that any other than the owner or demise or time charterer is carrier and/or bailee of the goods, all limitations of and exonerations from liability provided by law or by the terms hereof shall be available to such other.

2. Without limitation of any right the carrier may have herein, and for any matter whether known or unknown to carrier at time of shipment, the carrier, before or after loading at the original port of shipment or elsewhere, may substitute another vessel, discharge, tranship or forward the whole or any part of the goods by any other vessel or other means, whether operated by the carrier or by others, and whether leaving or arriving at the port of shipment or transshipment or destination before or after the carrier's vessel expected to be used. The vessel, with any part of the goods on board, either before or after proceeding toward the port of discharge and for any purpose whatever that the master may consider advisable, may stay in port, adjust compasses, dock, go on ways or to repair yards, shift berths, lie on the bottom in berth, move from place to place in any port, take fuel or stores, load or discharge cargo, sail without pilots, tow and assist vessels or be towed, save life, property of the carrier or others, proceed via the Panama Canal and/or Straits of Magellan and/or Suez Canal and/or Cape of Good Hope or otherwise and proceed by any route and through any waters whatever. The vessel may omit calling at any port whether scheduled or not, may deviate from or change the advertised, geographical, usual, ordinary or intended route at any stage of the voyage, may proceed beyond, or in a contrary direction to the port of discharge may stay at and load or discharge at any place whatever as inducements or convenience may offer, backwards or forwards, once or oftener and may load, carry or discharge cargo at, for or between intermediate or other ports, whether on this voyage or a preceding or subsequent voyage, even though two or more of such voyages may overlap. Any such procedure shall be considered within the scope of the voyage herein intended so fully as if specifically described herein. These provisions are not to be considered restricted by any words of this contract, whether written, stamped or printed.

3. The carrier shall not be under the liability of a carrier with respect to the goods except during such time as they may actually be in the carrier's custody. The carrier shall not be liable in any capacity whatever for any loss, damage, delay, misdelivery or failure to deliver, or any claim whatever, whenever and however occurring, unless shown to have been caused by the carrier's negligence. The burden of proving negligence shall be on the party asserting it. There shall not be any inference of negligence from the fact, nature or extent of damage.

4. The carrier shall have liberty to comply with any orders, directions or suggestions whatever with respect to the ship or goods whenever given by any person acting or purporting to act with the authority of any government or of any department thereof, or by any committee or person having, or purporting to have, under the terms of the war risk insurance on the ship, the right to give such orders or directions. If, in consequence of such compliance, the unrestricted space available to the carrier for the carriage of cargo is less than the full cargo capacity of the ship, the carrier may postpone the carriage of any part of the goods contracted for herein till some later date or cancel in whole or in part the engagement for carriage of all or any part of the goods and if any part of the goods has been loaded, may require the shipper to take delivery of the goods alongside the ship, and the carrier shall not be under any further responsibility with respect thereto. In case of war, hostilities, warlike or naval operations or demonstrations, blockade or interdict of any port, civil strife, piracies, civil commotions, strikes, lockouts or stoppage of labor, quarantine, ice or closure by ice, or the happening of any other matter or event, whether of like nature to those above mentioned or otherwise, whether any of the foregoing are actual or threatened and whether taking place at or near the port of discharge or elsewhere in the course of the voyage and whether or not existing or anticipated before commencement of the voyage, which matters or events, or any of them, in the judgment of the Master or carrier may result in damage to or loss of the vessel or give rise to risk of capture, seizure or detention of vessel and/or cargo, or of any part of the cargo, or make it unsafe or imprudent for any reason to proceed on or continue the voyage or enter or discharge cargo at the port of discharge, or give rise to delay or difficulty in reaching, discharging at or leaving the port of discharge, the carrier or Master may (1) before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the goods at port of shipment and upon failure to do so, may warehouse the goods at the risk and expense of the goods; or (2) whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, discharge the goods into depot, lazaretto, craft, or other place; or (3) proceed or return, directly or indirectly, to or stop at any port or place whatsoever, in or out of the regular route and short of or beyond the port of discharge as the Master or the carrier may consider safe or advisable under the circumstances, and discharge the goods, or any part thereof, at any such port or place. When the goods are discharged from the ship, as herein provided, they shall be at the risk and expense of the shippers and/or receivers; such discharge shall constitute complete delivery and performance under the contract, full bill of lading freight and charges shall be deemed earned and the carrier shall be freed from any further responsibility. For any services rendered to the goods as hereinabove provided, the carrier shall be entitled to extra compensation, for which, together with any unpaid freight and charges, the carrier shall have a lien on the goods.

5. Unless otherwise stated herein, the description of the goods and the particulars of the pieces, packages or customary freight units mentioned herein, are those furnished by the shipper, and the carrier shall not be concluded as to the correctness of leading marks, number, quantity, weight, gauge, measurement, contents, nature, quality or value. Each piece or package shall be clearly and durably marked on the outside in latters at least two inches high, with the name of the port of discharge and the weight, if it exceeds 4480 lbs. Any such weight shall be declared in writing by the shipper on shipment and the shipper shall pay extra charges that may be incurred for loading, handling, transshipping or discharging. The shipper shall be liable for and shall indemnify the shipowner in respect of any injury, loss, damage or claim whatever on the part of anyone whatever arising from shipper's failure to declare correctly the nature, character and weight of the goods and mark them as above provided, or as provided by law.

6. The shipper represents that the goods need not be stowed under deck unless the shipper informs the carrier in writing before delivery of the goods to the carrier that underdeck stowage is required. Goods stowed in poop, forecastle, deckhouse, shelterdeck, passenger space or any other covered and enclosed space commonly used in the trade for the carriage of goods shall be considered for all purposes as stowed under deck. In respect of goods carried on deck and so stated herein, all risks of loss or damage by perils inherent in such carriage, shall be borne by the shipper, but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions of said U.S. Carriage of Goods by Sea Act, notwithstanding Section 1(c)

thereof or the corresponding provision of any Carriage of Goods by Sea Act that may be applicable. Specially heated or cooled stowage is not to be furnished unless contracted for at an increased freight rate. The articles described in 4231 of said U. S. Revised Statutes shall not be considered delivered to the carrier until they are placed in the possession of, and signed for by the master or other officer on board the vessel and in charge of the deck at the time. Delivery of such articles at the port of discharge shall be taken upon the vessel's deck and any responsibility of the shipowner shall thereon wholly cease.

7. Live animals, birds, reptiles and fish are received and carried at shipper's risk of injury or mortality on the condition that they shall be considered goods and subject to all terms and provisions in this bill of lading and the U. S. Carriage of Goods by Sea Act or the corresponding provision of any Carriage of Goods by Sea Act that may be applicable relating to goods.

8. Fruits, vegetables, meats and any similar kind of goods will be carried in ordinary cargo compartments or holds unless it has been agreed in writing at the time of delivery to the carrier for a special rate of freight, that such goods will be carried in a refrigerated, chilled or specially ventilated compartment at a special rate of freight. Where a special rate of freight is not paid, the shipper represents that such goods do not need, and the carrier will not be required to give them any other treatment than that given to other cargo. The refrigerating, chilling or ventilating machinery and compartments shall be considered part of the machinery and appurtenances of the ship.

9. If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the non-carrying ship or her owners, in so far as such loss or liability represents loss of or damage to or any claim whatever to the owners of said goods, paid or payable by the non-carrying ship or her owners to the owners of said goods and set-off recouped or recovered by the non-carrying ship or her owners as part of their claim against the carrying ship or carrier. The foregoing provisions shall also apply where the owners, operators, or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.

10. In case of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatever, whether due to negligence or not for which, or for the consequences of which, the carrier is not responsible by statute, contract or otherwise, the goods, their owners, shippers or consignees shall contribute with the carrier in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods. If the salving ship is owned or operated by the carrier, salvage shall be paid so fully as if the salving ship were owned or operated by strangers. General Average shall be adjusted at any port or place selected by the carrier and according to York-Antwerp Rules 1950, and as to matters not therein provided for according to the laws and usages of the port of destination or any port of India or of the United States of America at carrier's option. The General Average statement in every instance shall be prepared by average adjusters selected by the carrier. In average adjustments, disbursements in foreign currency shall be exchanged into U.S. dollars at the rate prevailing at time of payment and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port of final discharge of such damaged cargo. Such deposit, agreement or other security as the carrier or his agents may consider requisite to cover the estimated contribution of the goods and any salvage and special charges thereon shall be made by the goods or shippers to the carrier, if required, before delivery. Any deposits shall be payable at carrier's option in U.S. dollars and shall be remitted to the adjuster to be held by him in a special account at the place of adjustment pending settlement of the General Average, if any. Refunds or credit balance shall be paid in U.S. dollars.

11. The port authorities are hereby authorized to grant a general order for discharging immediately on arrival of the ship and the carrier, without giving notice either of arrival or discharge, may discharge the goods directly they come to hand at or upon any wharf, craft or place that the carrier may select and continuously, Sundays and holidays included, at all such hours by day or by night as the carrier may determine, no matter, what the state of the weather or custom of the port

may be, and the goods shall be received, package by package, as discharged from the ship's tackle, if required by the carrier. The carrier shall not be liable in any capacity or respect whatever if heat or refrigeration or special cooling facilities shall not be furnished during loading or discharging or any part of the time that the goods are upon the wharf, craft or the place of loading or discharging. All lighterage and use of craft in loading or discharging shall be at the risk and expense of the goods and shall be provided by the shipper. If, notwithstanding, any arrangements for lighterage or craft are made by the carrier it shall be considered solely the agent of shipper and consignee and without any responsibility whatever. Landing and delivery charges and pier dues shall be at the expense of the goods unless included in the freight herein. Liquid cargo in bulk shall be pumped aboard by shipper so fast as vessel can receive at shipper's risk and expense so far as the vessel's connection and shall be received at port of discharge at vessel's connection at vessel's rail so soon and so fast as vessel is prepared to deliver. So soon as the goods are at the disposal of the consignee for removal they shall be at their own risk and expense and delivery by the carrier shall be considered complete. If the goods are not removed by the consignee within the next working day after they are at his disposal, they may, at carrier's option and subject to carrier's lien, be sent to store or warehouse or be permitted to lie where landed, but always at the risk and expense of the goods. The goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities. The carrier shall not be required to give any notice of disposition of the goods. If the vessel's loading or discharge is delayed through failure of shipper to supply cargo or to furnish lighterage or use of craft in discharging or to receive or remove the goods so that the vessel may load and discharge so fast as she can, the shipper will pay in U. S. currency for detention of the vessel at the current rate of charter hire per day per net register ton of the vessel.

12. The carrier shall not be liable for failure to deliver in accordance with leading marks unless the goods shall have been marked as herein required and the marks shall be decipherable at the port of transhipment or discharge. Goods that cannot be identified as to marks or numbers, cargo sweepings, liquid residue and any unclaimed goods not otherwise accounted for, shall be allocated to the various consignees of goods of like character in proportion to any apparent shortage, loss of weight or damage and shall be accepted as good delivery. Loss or damage to goods in bulk stowed without separation from other goods in bulk of like quality, either of the same shipper or other shippers shall be divided in proportion, among the several shipments.

13. In case of any loss or damage to or in connection with goods exceeding in actual value $500 lawful money of the United States, per package, or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit, or pro rata in case of partial loss or damage, unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid if required and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be declared to be the declared value and any partial loss or damage shall be adjusted pro rata on the basis of such declared value.

Whenever the value of the goods is less than $500 per package or other freight unit, their value in the calculation and adjustment of claims for which the Carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less.

14. The goods shall be liable and shall indemnify the carrier for all expense of mending, cooperage, baling, reconditioning, gathering of loose cargo or contents of packages; for any payment, fine, dues, duty, tax or impost, loss, damage detention, costs and expenses of whatever nature sustained or incurred by or levied upon the carrier or ship in connection with the goods or by reason of the goods being on board, or of any proceeding against or involving the goods by way of attachment, seizure, interpleader or in any way whatever.

15. Freight shall be payable at carrier's option on gross intake or discharged weight or measurement or on the basis of value or of package. Freight may be

calculated in the first instance on the particulars of the goods furnished by the shipper, but the carrier may at any time, examine weigh, measure and value the goods. If shipper's particulars are found to be erroneous and additional freight is payable, the goods shall be liable for any expenses incurred in examining, weighing, measuring and valuing the goods. Full freight to port of discharge named herein shall be considered completely earned on receipt of the goods by the carrier, whether the freight be stated or intended to be prepaid or to be colleced at destination; and the carrier shall be entitled absolutely to all freight and all charges due hereunder, whether actually paid or not, and to receive and retain them under all circumstances whatever, ship or cargo lost or not lost. If there shall be a forced interruption or abandonment of the voyage at the port of shipment or elsewhere, any forwarding of any part of the goods even if by another ship of the carrier, shall be at the risk and expense of the goods. All charges involving payment of money shall be due and payable day by day immediately when they are incurred and shall be paid in full without any offset, counterclaim or deduction, but without prejudice to any claim against the carrier for breach of contract hereunder. All payments shall be made at carrier's option in currency of the port of shipment or of the port of discharge at the current demand rate of New York exchange as quoted on the day the ship arrives off Quarantine Station at the port of loading. The carrier shall have a lien on the cargo, which shall survive delivery, for all charges due hereunder and may enforce this lien by public or private sale and without notice. The proceeds of sale shall be applied so far as they may go towards settlements of the carrier's charges and the carrier shall not be under any liability for consequences thereof, except to account for the balance, if any, such proceeds.

16. If goods are shipped with an option for one of several ports of dentination the shipper must give the agents at the first port of discharge notice of the exercise of the option, together with the original bill of lading 48 hours before the arrival at the first port of call. If this is not done, the master may discharge the goods at any one of the ports covered by the option.

17. Neither the carrier nor any corporation owned by, subsidiary to or associated or affiliated with the carrier, shall be liable to answer for or make good any loss or damage to the goods, occurring whether before, during or after loading or discharge by reason or by means of any fire whatever, wherever and, however occurring unless such fire is caused by carrier's design or neglect.

18. Whenever the goods are consigned to a point where the ship does not expect to discharge, or whenever the carrier may consider it advisable, the carrier, without notice, may forward the whole or any part of the goods before or after loading at the original port of shipment or at any other places whatever, even though outside the scope of the voyage or the route to or beyond the port of discharge or the destination of the goods, by any ship or by other means of transportation by water or by land or by air, or by all such means, whether operated by the carrier or by others and whether departing or arriving before or after the ship originally expected to be used. This carrier, in making arrangement for transshipping or forwarding by any means of transportation not operated by this carrier, shall be considered solely the forwarding agent of the shipper and without any other responsibility whatever. All transshipment or forwarding shall be subject to all the terms whatever in the regular form of bill of lading, freight note, contract or other shipping document used at the time by the carrier carrying on the transit, whether issued for the goods or not and even though such terms may be less favorable to the shipper or consignee than the terms of this bill of lading as to valuation of the goods or limitation of liability or in any respect whatever, and may exempt the carrier from liability for negligence. The shipper shall be liable to the carrier for any increase in freight charges of transshipping or forwarding ship made after the issuance of this bill of lading. Pending or during transshipment or forwarding the goods may be stored ashore or afloat at their risk and expense and the carrier shall not be liable for detention. The carrier shall not be liable in any capacity or in any circumstances whatever for any claim whatever with respect to the goods arising after discharge of the goods from the ship at the port of transshipment.

19. Written claim against the carrier of liability for any loss, damage, delay or non-delivery of the goods shall be given to the carrier within 30 days after the removal of the goods from the custody of the vessel or after the date when the goods should have been delivered to enable the carrier to make prompt investigation of the circumstances in connection with the alleged loss, damage, delay or non-delivery. If such written claim of liability is not given, the carrier

shall be considered prejudiced thereby and the claim shall be considered waived and the waiver may be pleaded in and constitute defense of any suit that may be brought thereafter against the carrier on said claim. Suit shall not be considered brought until service of process has been made against, or accepted by, the carrier.

20. Without limitation of the definition of terms in the Carriage of Goods by Sea Act, the word "ship" or "vessel" shall include any substituted vessel and any craft, lighter or other means of conveyance owned, chartered or operated by the carrier. in the performance of this contract; the word "carrier" shall include the vessel named herein, her owner, operator, charterer, master and any substituted carrier, whether the owner, operator, charterer or master shall be acting as carrier or bailee; the word "shipper" shall include the person named as such in this bill of lading, the person for whose account the goods are shipped, the consignee, the holder of the bill of lading properly endorsed, the receiver and the owner of the goods; the word "goods" shall include the whole or any part thereof and those included in the word "shipper": the word "person" shall include individual, corporation, partnership or other entity; the word "charges" shall include freight, subfreight, demurrage and all expenses and money obligations whatever, however and whenever incurred and payable by the goods or shipper and they shall be jointly and severally liable for all such charges; the words "invoice value" mean the actual value of the goods at the time and place of shipment and exclude freight, insurance or any other charges or items whatever, whether stated or included in any consular or commercial invoice or other paper.

21. It is intended that all the terms of this contract shall be valid, enforceable and available to the shipowner so far as and whenever the law will permit even where there has been negligence for which the shipowner is chargeable, and that in all instances where it may be possible to contract against the consequences of negligence, the shipowner, although negligent, shall not be under any liability whatever. If any part of any term of this contract is not enforceable, that circumstance shall not affect the validity of any other part of any term hereof.

22. All agreements or freight engagements for shipment of goods, except liquid goods in bulk, are superseded by this bill of lading and all its terms, whether written, typed, stamped or printed are agreed by the shipper to be binding so fully as if signed by the shipper, any local customs or privileges to the contrary notwithstanding. The terms of the contract for transportation of liquid goods in bulk shall be superseded only in so far as they may be inconsistent with the terms of this bill of lading. One signed bill of lading, duly endorsed, will be surrendered if required to agent of vessel at port of discharge in exchange for delivery order.

23. Unless otherwise expressly provided, this Bill of Lading shall be construed by the law of India, and the rights of the parties thereunder determined accordingly. Any claim for loss, damage or short delivery or otherwise arising out of this Bill of Lading shall be dealt with, at the option of the carrier, in the courts of India to the exclusion of proceedings in the courts of any other country.

24. Merchandise on wharf awaiting shipment or delivery shall be at Shippers' risk of loss or damage.

25. The contract or intended voyage, as herein described, includes calls for any purpose whatsoever, whether in connection with the present, a prior, or succeeding voyage.

26. The terms of this bill of lading constitute the contract of carriage which is between the shipper and the owner or demise charterer of the ship designated to carry the goods. It is understood and agreed that other than said ship owner or demise charterer, no person, firm or corporation or other legal entity whatsoever (including the master, officers and crew of the vessel and all agents and independent contractors) is or shall be deemed to be liable with respect to the goods as carrier, bailee or otherwise howsoever in contract or in tort. If, however, it shall be adjudged that any other than such ship owner or demise charterer is carrier or bailee of the goods or under any responsibility with respect thereto, all limitations of and exonerations from liability provided by law or by the terms hereof shall be available to such other.

27. This shipment and bill of lading when issued covering traffic from a Canadian port is subject to all the terms and provisions of and all the exemptions from liability contained in the Canadian Water Carriage of Goods Act, 1936 and other applicable statutes.

GREAT EASTERN LINE

APPENDIX G

Specimen U.K. Chamber of Shipping Fertilisers Charter, 1942—

Code Name : "FERTICON"

(Reproduced by the courtesy of the Chamber of Shipping of the United Kingdom)

Adopted by the Documentary Council of the Baltic and International Maritime Conference.

Amended 1st Jan. 1950.

Amended 28th July 1950.

CODE NAME "FERTICON"

CHAMBER OF SHIPPING FERTILISERS CHARTER, 1942

19

It is this day mutually agreed between Owners 1

of the good Steamship / Motorship called the of 2

tons gross register tons deadweight exclusive of bunkers, or thereabouts, now 3

and expected ready to load about and laydays not to commence before 4

unless used 5

and Charterers ; 6

Loading port. 1. That the said Vessel shall, with all convenient speed, proceed to 7

Cargo or so near thereunto as she may safely get and safely lie, afloat or aground,) and there load at a safe berth a full and complete cargo of 8 9

which the said Charterers bind themselves to ship, not exceeding what the Vessel can reasonably stow and carry over and above fuel for bunkers and Vessel's use, her tackle, apparel, provisions and furniture. 10 11 12

Destination. Being so loaded the Vessel shall proceed with all convenient speed to

Freight. (or so near thereunto as she may safely get and safely lie, afloat or aground,) and there deliver the cargo at a safe berth on being paid freight in cash, British Sterling, at the controlled rate of

per ton of 20 cwts., $\frac{\text{intaken}}{\text{delivered}}$ weight, or in the case of cargo measuring over 45 cubic feet to the ton, on the Vessel's cubic grain capacity of 45 cubic feet to the ton, but not exceeding the Vessel's deadweight cargo capacity, in full of all port charges, pilotages and harbour dues on the Vessel, the Charterers paying all dues and duties on the cargo.

The freight shall be paid at

by

Notice. Whenever possible, the Master or Owners to give Charterers or their agents, three clear working days' notice of probable readiness to load and quantity of cargo required unless the Vessel is already in the loading port when chartered.

Cancelling date. 2. Should the Vessel not be ready to load by the Charterers shall have the option of cancelling this charter.

Rate of loading, discharging, etc. 3. (*a*) The cargo shall be loaded and discharged in running hours, weather permitting.

(*b*) Time shall not count between noon on Saturday and 8 a.m. on Monday, nor between 5 p.m. (noon if Saturday) on the last working day preceding a legal holiday and 8 a.m. on the first working day thereafter, unless used or the Vessel is already on demurrage.

Time shall begin to count from berthing at each port, but not between the hours of 5 p.m. and 8 a.m. on a weekday or during any of the periods above excepted, unless used or (at discharging port) the Vessel arrives already on demurrage.

In the event of a berth to which the Vessel can forthwith proceed on arrival in the port not being available or of an insufficiency of water to enable the Vessel to berth on arrival, the Vessel shall be deemed to be in berth from first high water after arrival off the berth and time shall begin as above.

But, if prevented from entering port, harbour or docks, or from arriving at or off the loading or discharging place, by reason of congestion of shipping or shore traffic not due to strikes, lock-outs, civil commotions, frosts, floods, storms, bad weather, or accidents; the Vessel shall be regarded as if ready in berth from first high water on or after arrival at or off the port, or so near thereunto as she may be permitted to approach, and time shall begin as above, but the actual time occupied in moving from the place of stoppage to the actual place of loading or discharge shall not count as lay time.

MEMO.— Section (*b*) paras. 1 & 2 to be altered as necessary according to local conditions.

Loading, etc.

4. The cargo shall be loaded, stowed, trimmed and discharged by the Charterers free of expense and risk to the Vessel, but under the supervision of the Master.

The Vessel shall give the use of winches and steam or power for same, if required, but not exceeding their ordinary capacity.

Bulk cargoes.

For bulk cargoes the Charterers shall provide sufficient cargo in sacks to secure the cargo to he satisfaction of the Master.

Dunnage, etc.

Any mats and/or wood required by the Master for dunnage, separation, etc., shall be supplied by the Charterers at their expense.

Charterers to have the use of any dunnage that may be on board the Vessel.

Tallying, etc.

5. A declaration by the Master or Chief Officer that all cargo shipped has been delivered to the Receivers shall be, and shall be accepted as, conclusive evidence of that fact, unless the Receivers shall before the commencement of the discharge give to the Master notice in writing of their intention to tally the cargo, and unless such tally is in fact taken at the Vessel's hatchways.

Deck cargo.

6. In the event of any agreement to carry cargo on deck, the quantity shall be in the Master's discretion and cargo so carried shall be at the risk of the owner of such cargo.

Bill of Lading.

7. The Master or his agent shall sign Bills of Lading in the "BRITCONT" form, at any rate of freight required by the Charterers or their agents, without prejudice to this charter party, but at not less than the chartered rate.

Strikes, etc.

8. Neither the Charterers nor the Shipowners shall be responsible for the consequences of any strikes or lock-outs preventing or delaying the fulfilment of any obligations under this charter unless the Vessel is already on demurrage, in which case demurrage shall accrue notwithstanding such strikes or lock-outs. A strike or lock-out of the Shipper's or Receiver's men shall not prevent demurrage accruing if by the use of reasonable diligence he could have obtained other suitable labour.

If there is a strike or lock-out which in the opinion of the Master or Shipowners may affect the loading of the cargo, or any part of it, when the Vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, the Master or Shipowners may ask the Charterers to declare that they agree to reckon the laydays as if there were no strike or lock-out. Unless such declaration in writing (by telegram, if necessary) is received by the Shipowners within 24 hours (Sundays and holidays excepted) after Charterers receive the request the Shipowners shall have the option of cancelling this charter. If part cargo may proceed with same (freight payable on loaded quantity only) having liberty to complete with other has already been loaded, the Vessel cargo for the Shipowners' account at any port for any port or ports whether such ports are in the course of the chartered voyage or not.

In the event of a strike or lock-out at the port of discharge which might in the opinion of the Master or Shipowners delay the Vessel berthing or the discharge or delivery of the cargo, the Shipowners shall have the right to suspend the voyage should such strike still exist when the Vessel is ready at or off the loading port outside the radius of port dues and to make an intermediate coasting

voyage or voyages until the strike or lock-out has ended. Should the Shipowners elect to suspend the voyage they shall give to the Charterers not less than 5 days written notice of the date on which they expect the Vessel to be available at the loading port to perform the voyage under this charter. The Charterers shall within 36 hours of receipt of this notice declare whether they desire to cancel the charter or whether the Vessel is to be brought to the loading port and fulfil the charter. From 2 p.m. on Saturday to 9 a.m. on Monday shall be excluded from the said period of 36 hours.

Demurrage. 9. If the Vessel is detained longer than the time allowed for loading and/or discharging, demurrage shall be paid at £ per running day for the first three days and thereafter at £ per running day and pro rata.

Agents. 10. The Vessel shall be reported and/or cleared at the Custom House at loading and discharging ports by the Shipowners' agents.

Exceptions, etc. 11. The Shipowners in all matters arising under or affecting this contract (including matters before loading or after discharge) shall be entitled to the like privileges and rights and immunities as are contained in Sections 2 and 5 of the Carriage of Goods by Sea Act, 1924, and in Article IV of the Schedule thereto (see back) as being agreed terms of this contract. This charter party shall be deemed to be a contract for the carriage of goods by sea to which the said Sections and the said Article apply.

In the case of goods loaded at a port in Holland, the contract contained in this charter party shall be subject to Article 470 of the Maritime Code of the Netherlands and if and to the extent that any term of this charter party is contrary thereto such term shall *pro tanto* be null and void.

Liberties. 12. The Vessel shall have liberty to sail without pilots, to call at any port or ports in any order for fuel, supplies or any purpose whatsoever, to tow and be towed, to assist vessels in distress, to make trial trips after notice, and adjust compasses, all as part of the contract voyage. Salvage shall be for the Shipowers' benefit.

Lien. 13. The Shipowners shall have a lien upon the cargo for all freight, dead freight, demurrage, average, and all other charges whatsoever.

War. 14. (1) No Bills of Lading to be signed for any blockaded port and if the port of discharge be declared blockaded after Bills of Lading have been signed, or if the port to which the ship has been ordered to discharge either on signing Bills of Lading or thereafter be one to which the ship is or shall be prohibited from going by the Government of the Nation under whose flag the ship sails or the United Kingdom Government or by any other Government, the owner shall discharge the cargo at any other port covered by this charter party as ordered by the Charterers (provided such other port is not a blockaded or prohibited port as above mentioned) and shall be entitled to freight as if the ship had discharged at the port or ports of discharge to which she was originally ordered.

(2) The ship shall have liberty to comply with any or dersor directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the Government of the Nation under whose flag the vessel sails or the United Kingdom Government or any department thereof, or any person acting or purporting to act with the authority of such Government or of any department thereof, or by any committee or person having, under the

terms of the War Risk Insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly.

Average. 15. General Average (if any) shall be settled according to the York-Antwerp Rules, 1950.

Brokerage. 16. per cent. Brokerage upon the gross amount of freight and deadfreight is due by the Shipowners upon shipment of cargo to

Arbitration. 17. Any dispute arising under this charter shall be settled in accordance with the provisions Arbitration Act 1950 in London, each party appointing an Arbitrator, and the two Arbitrators in the event of disagreement appointing an Umpire whose decision shall be final and binding upon both parties hereto. The Arbitrators shall be commercial men.

Vessel's deadweight for demurrage purposes is tons

CARRIAGE OF GOODS BY SEA ACT, 1924

SECTION 2.

There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

SECTION 5.

Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of landing, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

SCHEDULE

RULES RELATING TO BILLS OF LADING

ARTICLE III.

—

RESPONSIBILITIES AND LIABILITIES.

PARA. 1.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(*a*) Make the ship seaworthy :

(*b*) Properly man, equip, and supply the ship :

(*c*) Make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

ARTICLE IV.

—

RIGHTS AND IMMUNITIES.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship :

(*b*) Fire, unless caused by the actual fault or privity of the carrier :

(*c*) Perils, dangers and accidents of the sea or other navigable waters.

(*d*) Act of God :

(*e*) Act of war :

(*f*) Act of public enemies :

(*g*) Arrest or restraint of princes, rulers or people, or seizure under legal process :

(*h*) Quarantine restrictions :

(*i*) Act or omission of the shipper or owner of the goods, his agent or representative :

(*J*) Strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general :

(*k*) Riots and civil commotions :

(*l*) Saving or attempting to save life or property at sea :

(*m*) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods :

(*n*) Insufficiency of packing :

(*o*) Iusufficiency or inadequancy of marks :

(*p*) Latent defects not discoverable by due diligence :

(*q*) Any other cause arising without the actual fault of privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100*l* per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

The declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

APPENDIX H

Specimen Australian Grain Charter, 1956—

Code Name : "AUSTWHEAT"

(Reproduced by the courtesy of the Chamber of Shipping of the United Kingdom.)

AUSTRALIAN GRAIN CHARTER, 1956

CODE NAME
"AUSTWHEAT"

AGREEMENT BETWEEN THE AUSTRALIAN WHEAT BOARD AND THE DOCUMENTARY COMMITTEE OF THE CHAMBER OF SHIPPING OF THE UNITED KINGDOM, NOVEMBER, 1956.
AMENDED JUNE, 1958.
AMENDED FEBRUARY, 1961

LONDON,..... 19

IT IS THIS DAY MUTUALLY AGREED BETWEEN as Agents / Brokers for and
on behalf of the Owners of the good Steamship / Motorship called the of the measurement of
tons gross, and tons net register, or thereabouts, classed , and
to be of that class when the Vessel sails with her cargo under this charter, now AND

AUSTRALIAN WHEAT BOARD of *MELBOURNE* Charterers

Loading port.
This clause may be varied as regards loading port at the time of chartering.

1.—That the said Vessel, being in every way fitted for the voyage shall, with all convenient speed, after completion of her present voyage and discharge of her outward cargo (if any) proceed, as ordered by the Charterers, to one or two ports out of **Fremantle, Geraldton, Bunbury, Albany,** in **Western Australia,** or to one or two ports out of **Wallaroo, Port Lincoln, Port Pirie, Adelaide, Thevenard,** in **South Australia,** or to **Melbourne** and/or **Geelong,** or vice versa, or **Portland (Victoria),** or to **Sydney** or **Newcastle, N.S.W.,** and there load according to the custom of the port, always afloat, at such safe dock, pier, wharves, and/or anchorage, as ordered, but the Vessel shall not be required to shift more than once at each port unless at Charterers' expense, from the Charterers or their agents, a full and complete cargo of **WHEAT** in bulk ex silo or ex bags, and/or bags, and/or **FLOUR** in bags, which the said Charterers bind themselves to provide, not exceeding what the vessel can reasonably stow and carry in addition to her tackle, apparel, provisions, fuel and furniture.

Cargo.

Destination.

2.—Being so loaded, the Vessel shall proceed with all reasonable speed via the **Suez Canal** or via **South Africa,** or via the **Panama Canal** to **Falmouth** (route at the Shipowners' option, which shall be declared by the Master on completion of loading) for orders (unless these be given by Charterers upon signing Bills of Lading) to discharge at one safe port in **Great Britain** or **Northern Ireland,** or on the Continent between **Antwerp and Hamburg** both inclusive

or so near thereunto as the Vessel can safely get, always afloat, and there deliver the cargo in accordance with clause 19, at any customary dock, wharf or pier as ordered by the Charterers or their agents, where the Vessel can safely lie, always afloat, upon being paid freight at the rate hereinafter mentioned. Provided always that on the Continent only if such discharging place is not immediately available, demurrage in respect of all time waiting thereafter shall be paid at the rate mentioned in clause 20.

The destination under this clause may be varied at the time of chartering.

The Charterers shall have the option of ordering the Vessel to discharge at any two safe ports in **Great Britain** and/or **Northern Ireland** or on the **Continent,** as above.

Orders for discharge at a second port, if any, unless given earlier, shall be given within 48 hours of arrival at the first port of discharge, or upon completion of discharge, whichever is the earlier. For any detention waiting for orders, the Charterers shall pay to the Vessel demurrage at the rate mentioned in clause 20.

Rotation of ports of discharge.

If the Vessel discharges at more than one port the discharging ports shall be in geographical (mileage) rotation from the port or point where first discharging port orders are given.

Safe trim between ports of discharge.

If the option of ordering the Vessel to discharge at two ports is not exercised, or if correct particulars of the cargo to be discharged at the first port of discharge are not given to the Master, before loading has commenced, any expense incurred by the Shipowners at the first port of discharge in shifting, discharging and/or reloading any cargo either for the purpose of putting the Vessel into seaworthy trim for the passage to the second port or to enable the cargo for discharge at the first port to be conveniently so discharged shall be paid by the Charterers, and the Charterers, shall indemnify the Shipowners against any claims by Bill of Lading holders in respect of such shifting, discharging and/or reloading cargo. In the event of the cargo being a homogeneous cargo (*i.e.*, of the same description, quality and mark) the Master shall discharge the cargo in such manner as to leave the Vessel in seaworthy trim to proceed to the second port of discharge.

Capacity.

3.—The Shipowners undertake that the Vessel shall not load more than tons nor less than tons, English weight (gross).

Cargo alongside.

4.—The cargo shall be brought to and taken from alongside the Vessel at the risk and expense of the Charterers. Provided that, where cargo in bags is brought in wagons within reach of the Vessel's tackle the Charterers shall at their expense put the bags at the open doorway of the wagon in such a position that the may be taken most conveniently by the Shipowners' men standing on the quay, the cargo being taken from such doorway at the Shipowners' expense; and provided also that in the case of all cargo loaded by gantry the Charterers shall at their expense put the bags on to the gantry and the cargo shall remain at the Charterers' risk until over the ship's rail.

Freight.

5.—Freight shall be payable at the rate of :—

British Sterling if discharged at one safe port in Great Britain or Northern Ireland.

" " " " at one safe port on the Continent, as above.

" " " " at two safe ports in Great Britain and/or Northern Ireland.

" " " " at two safe ports on the Continent, as above.

all per ton of 2,240 lbs. or 1,016 kilos ; net weight delivered (less a deduction for draftage of 2 lbs. per 2,000 lbs. of Wheat discharged at a port in Great Britain or Northern Ireland and weighed at the time of discharge by approved hopper scale in drafts of 2,000 lbs. or over). The cargo shall be weighed as customary at the port of discharge at Consignees' expense.

Should Charterers give the Vessel her orders on signing Bills of Lading at completion of loading, for a direct port or ports of discharge, or for first port of discharge, (within the limits named in this charter-party) the rate of freight shall be reduced by Sixpence per ton. Such reduction shall not invalidate the option (if any) of discharging at a second port.

The said Freight, less advances, if any, shall be paid on unloading and right delivery of the cargo in cash. If the Vessel is ordered to a port outside of Great Britain or Northern Ireland to discharge, the freight shall be paid in cash at the rate of exchange current for short sight bills on London on date of payment, or at Charterers' option, in cash in London. In all cases freight shall be paid concurrently with the discharge.

Declaration of loading area if in ballast.

6.—The Owners of a Vessel proceeding in ballast to Australia shall advise Charterers of the outward route. In the event of Charterers having full range of loading ports they shall declare whether Vessel is to load in Eastern States or Western Australia 48 hours before Vessel is due off Cape Town, Aden or Panama, provided that the Master has given wireless notice to Charterers (telegraphic address *"WHEATBOARD MELBOURNE"*) ninety-six (96) hours before she is so due. In the case of Vessels proceeding from Eastern Waters (*i.e.*, ports east of Aden including India and Persian Gulf ports), Charterers (telegraphic address as above) shall declare Eastern or Western loading upon receipt of Master's application 48 hours before Vessel is expected to leave final port.

Upon receipt of foregoing declaration, the Master or Shipowners shall telegraph Charterers (telegraphic address as above) Vessel's probable date of arrival at the loading area.

Orders for Loading Port.

7.—If proceeding in ballast, the Master shall apply to Charterers (telegraphic address *"WHEATBOARD MELBOURNE"*) for loading port orders by wireless 96 hours before arrival at the loading area nominated under Clause 6, and orders for loading port shall be given by Charterers by wireless within 48 hours of receipt of Master's application.

Orders for a vessel with cargo for, or discharging in, Australia shall be given to the Master or Shipowners' Agents at the Vessel's final discharging port upon the Master or Shipowners' Agents giving the Charterers written or telegraphic notice of the Vessel's position and expected readiness, such Notice to be given at least three days before her expected departure from final discharging port. Failure so to radio or telegraph under this clause shall not be considered a breach of Charter, but if Charterers are not so notified, three days shall be added to the loading time.

Upon receipt of loading port orders by a Vessel in Australian Waters, if the Master does not intend thereafter to proceed to the loading port direct, but via another port for the purpose of bunkering, he shall so inform the Charterers. If after orders for loading port are given the Vessel is delayed for at least 48 hours in all the Master shall inform the Charterers by telegram or radiogram of such delay and they shall have the right of ordering vessel by telegram or radiogram to a different loading port in the same State, if such orders are given within 24 hours (Sundays and holidays and Saturdays after noon excepted) of receipt of the Master's telegram ; and such orders shall be acknowledged to the Charterers by telegram or radiogram as soon as possible after receipt thereof by the Master.

Orders for second loading port (if any) shall be given within 24 hours after commencement of loading at the first port, unless given previously.

Cargo in bulk.

When giving loading port orders to a Vessel in Australian Waters Charterers shall declare whether they intend to load any cargo in bulk, otherwise the time used in putting up shifting boards (if required) shall count as time used in loading, provided the shifting boards be erected with the customary dispatch.

Survey at loading port.

8.—Before loading is commenced the Vessel shall pass the customary survey of a Commonwealth Navigation Department surveyor, a Marine Underwriters' Association surveyor, a Lloyd's Register surveyor, or other certificated marine surveyor approved by the Charterers.

Loading.

9.—The cargo shall be loaded at not less than the average rate of 1,500 tons for cargo in bulk, 1,000 tons for bulk ex bags and 500 tons for cargo in bags (except for the quantity of cargo in bags

requested by the Master pursuant to the seventh paragraph of this clause, which shall be loaded at not less than the average rate of 100 tons per available workable hatch unless loaded concurrently with bulk wheat in which case the ruling rate for cargo in bulk or bulk ex bags to apply) per weather working day of 24 consecutive hours (except Saturdays, Sundays, holidays and days on which no work is performed owing to weather conditions during normal and customary working hours at the port) provided the vessel can receive at this rate, and provided that Saturday shall count as a full day if work is performed on that day, subject to a reduction of half a day if no work is performed after noon. Any time lost on a working day owing to weather conditions shall not count provided work is actually stopped or prevented thereby.

At the first loading port the time for loading shall count (unless loading is sooner commenced) from 24 hours after Charterers or their Agents have received the Master's written or telegraphic notice between 9 a.m. and 5 p.m. on ordinary working days and between 9 a.m. and noon on Saturdays that the Vessel has passed survey in accordance with Clause 8, and is ready to load at such berth as may be ordered by Charterers, whether in berth or not. Orders as to loading berth shall be given the Vessel upon receipt of notice of her arrival in the port.

Notice shall be given at the first port or place of loading only.

At the second or subsequent loading port (if any) the time for loading shall count (Sundays, holidays and Saturdays after noon excepted) from noon of the day of arrival in the port if the Vessel arrives before noon, and from 9 a.m. of the following day if the Vessel arrives after noon, unless loading is commenced earlier, in which case the time shall count from commencement of loading.

Half time occupied in taking off and replacing hatches shall count as loading time except at the commencement and completion of loading at each port in which case time shall not count.

Time occupied in changing ports shall not count as loading time.

Should the Charterers elect to load cargo in bulk they must supply as requested by the Master a sufficient quantity of cargo in bags so as to provide the ship with a full and complete cargo in all cargo carrying compartments, or to load her down to her marks as may be appropriate.

The Charterers shall pay the cost of bagging cargo in bulk up to 10 per cent. of the entire cargo, if required under the preceding paragraph, and the Shipowners shall pay the cost of bagging any quantity in excess of 10 per cent. This provision shall only apply when cargo in bulk is shipped.

If separations for bulk cargo are required the cost of such separations shall be paid by the Charterers.

The Charterers or their Agents shall have the right of sending the cargo alongside continuously (Sundays and holidays excepted) and the Vessel shall be bound to proceed with the loading if so required. In such cases all additional stevedoring and tallying expenses incurred as a result of working outside ordinary working hours shall be for Charterers' account.

Loading and cancelling dates.

10.—Time for loading shall not commence before.....unless the Charterers begin loading sooner, and if the Vessel is not ready to load at all hatches at (first) loading port by noon of the.....the Charterers shall have the option of

cancelling this charter, which shall be declared upon notice of readiness being given, unless more time has been lost waiting for orders than mentioned in clause 7, in which case the cancelling date shall be correspondingly extended. For the purpose of this clause the preliminary 24 hours' notice of readiness to load, stipulated for in clause 9, shall not be obligatory, and in no case shall the absence or non-readiness of shifting boards, or the absence of a ready loading berth as per clause 9, constitute a reason for cancelling this charter.

Stevedores and Tally Clerks.

11.—The Stevedore at loading port of ports shall be nominated by the Shipowners subject to the Charterers' approval, which approval is not to be unreasonably withheld. All cost of loading, together with the charges incidental thereto, shall be borne by the Shipowners except such as are payable by the Charterers under Clauses 4 and 9.

The cargo shall be stowed under the supervision and direction of the Master who shall have the right of appointing tally clerks on behalf of the Shipowners.

Agents.

12.—At the port or ports of loading the Vessel shall be consigned to *nominees of the AUSTRALIAN WHEAT BOARD* (as mutually agreed at the time of chartering) at a fee of £42 Australian payable once only.

At the port or ports of discharge the Vessel shall be consigned to the Shipowners' agent.

Demurrage and Dispatch. (loading).

13.—Should the Vessel not be loaded at the rate herein stipulated, demurrage shall be paid at the rate of British sterling per gross register ton per running day and *pro rata* for any part of a day. Such demurrage shall be paid day by day, when and where incurred.

For all working time saved at port or ports of loading dispatch money shall be paid on completion of loading at the rate of one-half of the above rate of demurrage.

Advances to Master.

14.—Cash for the Vessel's ordinary disbursements at the port of loading, not exceeding one-third of estimated Freight, shall be advanced, if required by the Master, by Charterers or their Agents, subject to two and a half per cent. for commission, in addition to the cost of Insurance, plus (or minus, as the case may be), the difference in exchange, if any, the amount of the advance being endorsed on the Bills of Lading, and deducted from the Freight at settlement. The Charterers shall be free of all responsibility for the due appropriation of such advances.

Lump sum Allowance.

15.—If the Vessel is loaded at one port only in South or Western Australia, the Shipowners shall pay to the Charterers at the loading port a lump sum of £250 (say Two Hundred and Fifty Pounds) Australian.

Bill of Lading.

16.—Without prejudice to this charter-party, the Master shall sign Bills of Lading for the cargo, in the form endorsed on this charter, freight and all terms, conditions, clauses, and exceptions as per this charter, at the current or any rate of freight required by the Charterers, but not less in the aggregate than the chartered rate (unless the difference be paid in cash on signing), and if more than chartered freight, the excess shall be endorsed on the Bills of Lading as an advance against freight, free of all commission and charges.

Strikes.

17.—If the cargo cannot be loaded or discharged by reason of a strike or lock-out of any class of workmen essential to the loading or discharging of the cargo, any time lost by reason thereof shall not

count during the continuance of such strike or lock-out unless the Vessel is already on demurrage, but a strike or lock-out of the shipper's or Receiver's men shall not prevent demurrage accruing if by the use of reasonable diligence he could have obtained other suitable labour. In the case of any delay by reason of the before mentioned causes, no claim for damages in respect thereof shall be made by the Shippers or the Receivers of the cargo, the Owners of the Ship, or any other party under this charter. For the purpose of settling dispatch money accounts, any time lost by the Vessel through any of the above causes shall be counted as time used in loading, or discharging.

Orders for Port of Discharge.

18.—Orders as to port of discharge, if not given en route, shall, in Charterers' option, be given to the Master or in London to the shipowners or their agents (..... London) by the Charterers or their London Agents (whose name and telegraphic address *AUSTRALIAN WHEAT COMMITTEE, Tel. Add., "WHEATCOMIT LONDON TELEX"* shall be given in writing by the Charterers to the Master before sailing from the last loading port) within 24 hours (Sundays and holidays excepted) after receipt by them of the Master's telegraphic notice of the Vessel's arrival at Falmouth.

For any detention waiting for orders after the aforesaid 24 hours, the Charterers shall pay to the Vessel demurrage at the rate mentioned in clause 20.

If orders are given prior to Vessel's arrival at Falmouth, the 24 hours, as above, is not to be added to laytime at port of discharge.

The Vessel shall not be detained on demurrage waiting for orders at Falmouth for more than 10 days in all.

Time for discharging.

19.—On the continent the time for discharging shall be in accordance with the custom of the port for steamships at the port of discharge.

In Great Britain and Northern Ireland, time for discharging shall commence 24 hours after notice of readiness has been given during ordinary office hours, whether in berth or not, at first or sole port of discharge and on arrival at second port if any. If the ship be ordered to Avonmouth, Glasgow or to a port in the River Humber and is unable to give notice of readiness (as above) by reason of congestion in such port time shall count, if the port concerned be the first or sole port of discharge, 24 hours after arrival (or if second port of discharge, upon arrival) at Walton Bay in the Bristol Channel, at the Tail of the Bank in the River Clyde or at Spurnhead at the entrance to the River Humber (time from declaration by Receivers that berth is available until arrival in berth shall not count). Cargo is to be discharged at the average rate of 1,000 tons per weather working day of 24 consecutive hours (Satudays after noon, unless used, Sundays and holidays excepted) provided Vessel can deliver at this rate.

Demurrage and dispatch (discharging).

20.—Should the Vessel not be discharged at the rate herein stipulated, demurrage shall be paid at the rate of.....British Sterling per gross register ton per running day and *pro rata* for any part of a day.

For all working time saved at port or ports in Great Britain or Northern Ireland, dispatch money shall be paid at the rate of one-half of the above rate of demurrage.

Dispatch money, if any, at discharging port or ports shall be calculated on the basis of a weather working day of 24 consecutive hours but any time lost on a working day owing to weather conditions shall not count provided work is actually stopped or prevented thereby.

Demurrage or dispatch, if any, at discharging port or ports shall be paid when and where incurred, but in Great Britain or Nothern Ireland the cargo shall be treated as a whole and settlement to be made on completion of discharge.

At port of discharge. 21.—Bags may be cut open on Vessel's deck at port of discharge if required by the Consigness, at their expense. Cargo shall be weighed on board if required.

Lighterage. 22.—Should the Vessel be ordered to discharge at a place to which there is not sufficient water for her to get the first tide after arrival without lightening, and lie always afloat, discharging time shall count from 48 hours after her arrival at a safe anchorage for similar vessels bound for such place, and any lighterage incurred to enable the Vessel to reach the place of discharge shall be at the risk and expense of the Receivers of the cargo, any custom of the port or place to the contrary notwithstanding, but time occupied in proceeding from the anchorage to the port of discharge shall not count.

Supervising cargo. 23.—The Charterers or their agents shall have the right of being on board the Vessel whilst at loading port and/or discharging port for the purpose of inspecting the cargo, checking the weights, and supervising their interests.

Exceptions, etc. 24.—The provisions of Sections 5 and 8 of the Australian Sea-Carriage of Goods Act, 1924, and of Articles III (except clause 8 thereof), IV, VIII, and IX of the Schedule thereto shall apply to this charter-party and shall be deemed to be inserted *in extenso* herein. This charter-party shall be deemed to be a contract for the carriage of goods by sea to which the said Sections and the said Articles apply, and no regard shall be had to Article I of the said Schedule. Nothing in this clause shall be deemed to prejudice or limit clauses 5, 17, 25, 26, 29 and 31 hereof.

Liberties. 25.—The Vessel shall also have liberty to sail without pilots, to call at any port or ports on the way for fuel, supplies, or any reasonable purpose, to tow and be towed, and to assist vessels in distress, all as part of the contract voyage.

War.
Prohibition of Export. 26.—If the nation under whose flag the Vessel sails shall be at war whereby the free navigation of the Vessel is endangered, or in case of blockade of or prohibition of export from the loading port, this charter shall be null and void at the last outward port of delivery or at any subsequent period when the difficulty may arise, previous to cargo being shipped.

Sub-letting. 27.—The Charterers shall have the right of sub-letting the whole or part of the Vessel, but shall remain responsible for the due fulfilment of this charter-party.

Cesser clause. 28.—The Charterers' liability under this charter shall cease, except as regards clauses 2 lines 27/32 (*viz.*, safe trim between ports of discharge), 5 (*viz.*, payment of freight in London in the case of a Vessel discharging at a port elsewhere than in Great Britain or Northern Ireland), when the cargo is shipped (provided it is worth the freight, dead freight and demurrage, upon arrival at port of discharge), the Shipowners or their agent having an absolute lien on the cargo for freight, dead freight, demurrage, damages for detention at port or ports of call and/or discharge.

Bunkering.

29.—The Vessel shall have the right of proceeding to and bunkering at any usual bunkering port in Australia before loading, and at any usual bunkering port or ports on the way after loading. Vessel shall have the right of bunkering at loading port before or after loading.

Additional discharging port options.

30.—The Shipowners shall not give any additional discharging options under this charter without the consent in writing of the Charterers or their agents, and no cargo other than that provided by Charterers shall be carried without Charterers' written consent, unless the Vessel is sub-let.

Average.

31.—General average, if any, shall be settled according to the York-Antwerp Rules, 1950.

Commission.

Delete (a) or (b) at time of chartering.

32.—Five per cent. commission upon the freight and dead freight (if any) is due by the Shipowners to the Charterers on the completion of loading (at the last loading port if more than one) and shall be paid (*a*) in London in British sterling, or (*b*) in Australia in the equivalent of British sterling in Australian currency at the telegraphic transfer rate of exchange for London on Australia, ruling at the end of the last day of loading. The commission shall be paid upon the estimated gross freight, any difference being adjusted in London in sterling with the Charterers when the actual freight and dead freight (if any) are ascertained. If the vessel is lost on passage between loading ports, then in lieu of the foregoing, five per cent. commission upon the freight on the net bill of lading weight of the cargo already shipped shall be paid by the Shipowners to the Charterers on the basis aforesaid.

Brokerage.

33.—.....per cent. brokerage is due upon shipment of cargo, to.....

Arbitration.

34.—Any dispute arising under this charter or any Bill of Lading issued hereunder about events happening in Australia shall, unless the parties agree forthwith upon a single Arbitrator, be settled by arbitration at the capital city of the Australian State in which the Vessel loads, each party appointing an Arbitrator and the two Arbitrators in the event of disagreement appointing an Umpire whose decision shall be final and binding upon both parties hereto. For the purpose of enforcing any award this agreement may be made a Rule of Court.

Any dispute arising under this charter or any Bill of Lading issued hereunder other than provided for in the preceding clause shall be settled in accordance with the provisions of the Arbitration Act, 1950, in London, each party appointing an Arbitrator, and the two Aribitrators in the event of disagreement appointing an Umpire whose decision shall be final and binding upon both parties hereto.

The Arbitrators and Umpire shall be commercial men normally engaged in the Shipping Industry.

Any claim must be made in writing and claimant's Arbitrator appointed within six months of the Vessel's arrival at final port of discharge, otherwise all claims shall be deemed to be waived.

Penalty.

35.—The penalty for non-performance of this agreement shall be proved damages not exceeding the estimated amount of freight.

Shipper's

Railway weight.—Weight shipped unknown

Harbour Authority }

tons Wheat in bulk.

tons Wheat in bags.

tons Flour in bags.

Total *tons in bags.*

(1) If for a direct port strike out "for orders at or off.....or as given en route" and fill in name of direct port in (2).

(2) If for port of call for orders strike out "for....."

Shipped *at.....in apparent good order and condition by.....*

of.....in and upon the good Steamship/Motorship called the.....and bound { *(1) for Orders at or off.....or as given en route* / *(2) for.....* } *direct or via other ports as per charter party dated.....19 ,*

with liberty to sail without pilots, to call at any port or ports on the way for fuel, supplies, or any reasonable purpose, to tow and be towed, and to assist vessels in distress, all as part of the contract voyage.

**a cargo of Wheat in bulk of..... / parcel*

.....tons, being the weight ascertained or accepted by the Railway Authorities / Harbour Authority under the custom of the trade, weight shipped unknown,.....bags of Wheat, weight unknown,

*Where the weight of cargo in bulk inserted in the Bill of Lading is the Shipper's weight, the words "being the weight ascertained or accepted by the Railway Authorities / Harbour Authority under the custom of the trade" should be deleted, and the words "Shipper's weight" inserted.

but said to weigh.....tons,

.....bags of Flour, weight unknown, but said to weigh.....

.....tons,

.....

being marked and numbered as per margin and to be delivered in the like apparent good order and condition at the aforesaid port of

(3) Fill in name of port of discharge if for direct port, or "as ordered at port of call as per charter party" if for orders.

(3).....

unto.....

or.....Assigns, he or they paying Freight for the same as per the above mentioned charter party, all the terms, conditions, clauses and exceptions including Clause 34 in which charter party are herewith incorporated.

A number of second-hand and dry-stained bags. This clause refers to Packages only, not to contents.

This Bill of Lading is to have effect subject to the provisions of the Rules contained in the Schedule to the Australian Sea-Carriage of Goods Act, 1924, as applied by that Act. The Shippers are to be entitled to the benefit of the privileges, rights and immunities conferred upon the Shipper, and the Ship-owners are to be entitled to the benefit of the privileges, rights and immunities conferred upon the Carrier, by such Act, and the Schedule thereto, as if the same were herein specifically set out, the unit under Article IV (5) being the ton.

General Average (if any) shall be settled according to the York-Antwerp Rules, 1950.

Received on account of Freight

.....

Pounds.....Shillings

and.....Pence, upon which Interest and Insurance have been paid.

£.....

In Witness *whereof the Master or Agent of the said Ship hath signed.....Bills of Lading all of this tenor and date, any one of which being accomplished the others shall be void.*

WEIGHT SHIPPED, QUALITY & CONTENTS UNKNOWN.

INDEX

(Reference is to Pages)

Words and Phrases—

ERRATA

p. 104, n. 26—*For* (1934) p. 189 *read* (1934) P. 189.
p. 124, n. 26—*For* (1897) p. 226 *read* (1897) P. 226.
p. 125, n. ***—*For* (1914) p. 218 *read* (1914) P. 218.
— n. 28—*For* (1892) p. 304 *read* (1892) P. 304.
— n. 29—*For* (1899) p. 285 *read* (1899) P. 285.